92-308
Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1992

JOHN DOE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. JURISDICTION IN THE COURT OF APPEALS

Whether the denial of a Rule 41(e) motion for the return of property on behalf of an intervener is a final appealable order pursuant to 28 U.S.C. § 1291, when the record lacks any competent evidence that the items seized are related to a criminal proceeding "*in esse*."

II. ABANDONMENT

A. Whether Petitioner's property must be returned because Petitioner had not voluntarily abandoned it and the Government failed to obtain a search warrant, but rather attempted to use a grand jury subpoena as a substitute for such a warrant.

B. Whether the landlord's unconstitutional use of Pennsylvania's distraint statute in locking Petitioner out of the premises without notice, vitiates any evidence of a willful abandonment.

C. Whether the putative consent to search obtained by the Government was invalid because Petitioner had been illegally locked out of the premises, and whether Petitioner's property should therefore be returned.

D. Whether a search warrant should have been obtained by the Government to search each separately secured filing cabinet inside Petitioner's premises.

III. OVERBREADTH

Whether the grand jury subpoena, demanding all of the records of Amin A. Rashid & Associates, was unconstitutionally overbroad when it failed to particularly describe either the items to be seized or the probable-cause basis for the seizure.

IV. EXECUTION

Whether the Government's failure to knock and announce their presence and the purpose of their entry to Petitioner's premises requires the return of Petitioner's property under Rule 41(e).

V. FIFTH AMENDMENT

Whether the Government may not circumvent the safeguards of the Fourth and Fifth Amendments by unlawfully seizing Petitioner's records and compelling him to appear and reclaim his records, thereby forcing Petitioner to authenticate the contents thereof in violation of the Fifth Amendment.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, John Doe, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit refusing to consider the merits of petitioner's Rule 41(e) motion for return of property, which property was seized by the United States Government in violation of the Fourth and Fifth Amendments to the United States Constitution.

OPINIONS BELOW

The order of the United States Court of Appeals for the Third

Circuit denying the petitioner's request for hearing *en banc*, issued on May 18, 1992, is Appendix A to this petition. The order of the Third Circuit refusing to consider the merits of petitioner's Rule 41(e) motion is Appendix B to this petition. The order of the District Court for the Eastern District of Pennsylvania denying petitioner's Rule 41(e) motion, issued on August 8, 1992, is Appendix C to this petition.

STATEMENT OF JURISDICTION

The Court of Appeals' decision in this matter, denying petitioner's Rule 41(e) motion, was filed on March 16, 1992. A timely petition for rehearing was filed on March 30, 1992. The Court of Appeals' denial of petitioner's request for rehearing was issued on May 18, 1992. Pursuant to Rule 13 of the Rules of this Court, this petition has been timely filed before August 17, 1992. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal implicates Amendments IV and V to the United States Constitution, which are set forth in full in Appendix H.

STATEMENT OF THE CASE

A. Introduction

This case centers upon the government's unlawful search and seizure of petitioner's premises, resulting in the seizure of volumes of personal and private documents. This seizure was effectuated by government agents smashing open the door to petitioner's rental property, drilling open filing cabinets, and randomly seizing each and every document on the premises. The government agents did not have petitioner's consent and did not have a search warrant; rather, they attempted to use an overbroad grand jury subpoena

served on a third party to justify their unlawful entry. As set forth below, the seizure in question was in violation of petitioner's Fourth and Fifth Amendment rights.

B. Facts

On or about August 1, 1989, petitioner signed a lease in the name of "Amin Rashid & Associates, P.C." for office space and furniture located on the 30th floor of the Lewis Tower Building in Philadelphia, Pennsylvania. (A copy of the lease constitutes Appendix "F".) In November 1990, Mr. Rashid experienced difficulty paying his rent, and on November 14, 1990, Jeffrey Seligsohn, an employee of Binswanger Management Corp., the building manager, instructed Mr. Rashid that neither he nor any of his employees would be permitted to remove any of the property from the 30th floor of the Lewis Tower Building (App. 24a).[1]

On December 14, 1990 the office of Robert Guzzardi, Esquire, counsel for the owner of the Lewis Tower Building, informed Daniel Bernstein, then counsel for petitioner, that Mr. Rashid would be forcibly locked out of the building on December 17 (App. 24a). Mr. Bernstein was unable to advise Mr. Rashid of the lockout until 9:30 a.m on December 17, after the lockout had already been effected (App. 25a). After Mr. Rashid was forcibly removed from the premises, Mr. D'Erasmo turned off the elevators to the 30th floor, precluding Mr. Rashid from entering without a special key, which the landlord did not provide (App. 40a).

Mr. Rashid never intended to abandon any of his property that remained at Lewis Tower (App. 48a). In fact, he retained Mr.

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1. Unless otherwise noted, references to "App." are to the appendix pages containing the transcript of a hearing held in the United States District Court for the Eastern District of Pennsylvania, before the Honorable Judge Buckwalter, on August 7, 1991. A complete copy of that transcript is Appendix "E".

Bernstein to offer partial payment in exchange for allowing him access to the premises to remove his files (App. 26a). Mr. Guzzardi rejected this suggestion and refused entry without payment in full (App. 26a).

Although Federal Postal Agent Carol Hazelton did not search Mr. Rashid's premises until March 4, 1991, she was aware, as early as January 25, 1991, of Mr. Rashid's temporary business address at 1424 Chestnut Street, Philadelphia, PA. (App. 9a). However, when Agent Hazelton eventually served the grand jury subpoena on Jeffrey Seligsohn, on February 28, 1991, no attempt was made to notify Mr. Rashid of the government's intentions to seize his records (App. 5a). Although the grand jury subpoena requested personal and private documents of the petitioner, it was directed to a third party and contained vague and overbroad language. (A copy of the grand jury subpoena in question is Appendix "G".) Mr. Seligsohn promptly informed Mr. Guzzardi of the government's subpoena. However, Seligsohn declined to give the petitioner this same information, notwithstanding petitioner's repeated efforts to contact Mr. Seligsohn regarding a settlement of the landlord/tenant dispute (App. 27a).

On January 31, 1991, the landlord's agent at the Lewis Tower Building placed a "distraint" on the entire office space and contents leased to Amin A. Rashid & Associates, by posting notice on the 30th floor, knowing full well that Petitioner had no means of observing such notice (App. 32a). Petitioner received no notice of the landlord's "distraint" or the fact that the electric elevators had been turned off (App. 40a, 60a).

On or about early January and February, 1991, at Mr. Rashid's request, Mr. Bernstein made two telephone calls to Mr. Guzzardi's office to further inquire whether any of Mr. Rashid's property had been removed (App. 27a). In response, Mr. Guzzardi's office incorrectly informed Mr. Bernstein that the "status quo" of his

property remained the same (App. 27a). In early March, 1991, Mr. Rashid instructed Mr. Bernstein to commence settlement negotiations with Lewis Tower to gain entrance to the 30th floor and to renew his lease (App. 27a, 28a).

On March 4, 1991, unbeknownst to Mr. Rashid or to Mr. Guzzardi, Agent Hazelton and FBI Agent Williams forcibly entered the 30th floor of the Lewis Tower (App. 7a). Once inside, Agent Hazelton drilled open a number of locked filing cabinets and randomly rifled through Mr. Rashid's records (App. 13a, 15a). The agent returned the next day and removed all of Mr. Rashid's records, including privileged litigation files and other personal memoranda (App. 14a, 15a). Mr. Rashid offered uncontradicted testimony that he never intended to abandon the files or to waive any attorney-client privilege (App. 50a).

Mr. Rashid, through Mr. Bernstein, agreed to a new lease with Mr. Guzzardi to satisfy the prior debt and to pay for "storage rent" (App. 29a). In accordance with this agreement, Mr. Rashid drafted two checks, one for $28,817, for back rent and "storage rent," and the other for $9,300, representing an additional security deposit (App. 30a). Prior to completing the transaction, Mr. Rashid inspected the premises with Mr. Bernstein and for the first time, on April 29, 1991, learned that his files had been seized by the Government (App. 30a, 31a). Throughout this period of negotiations while Mr. Rashid was attempting to regain access to the premises, he maintained an operable telephone in the name of Amin Rashid & Associates (App. 31a). Upon learning of the seizure, Mr. Rashid immediately inquired of Mr. Guzzardi whether or not the parties could amend the settlement agreement. Mr. Guzzardi denied Mr. Rashid's request and further stated that he had no idea the items were missing prior to April 29, 1991 (App. 31a). Mr. Rashid persisted in attempting to gain access to the premises by telephoning Mr. Seligsohn of Binswanger in order to request an amendment to the Settlement Agreement (App. 26a, 27a), but was

informed that Mr. Seligsohn was unavailable. Mr. Seligsohn never returned any of Mr. Rashid's telephone calls (App. 27a).

Mr. Rashid's efforts to gain access to the premises were unsuccessful, but upon learning of the seizure, he quickly petitioned the District Court to intervene and quash the subpoena (App. 4a, July 18, 1991 hearing).[2] On or about October 1, 1991, pursuant to an agreement between undersigned counsel and Thomas Suddath, Jr., AUSA, Mr. Rashid was permitted to begin making copies of his personal records which had been seized by the government. Due to the importance of these documents, Mr. Rashid immediately accepted the government's offer to recover copies of certain non-incriminating documents (App. 66a, 67a).

C. Proceedings Below

The United States District Court for the Eastern District of Pennsylvania's denial of petitioner's Rule 41(e) motion on August 7, 1991, was erroneous, since petitioner's personal property was forcibly and unlawfully seized without a search warrant. Furthermore, as of the writing of this Petition, the District Court declined to issue findings of fact, as required by Fed. R. Crim. P. 12(e).

Petitioner appealed to the Third Circuit, requesting a review of the merits of the District Court's ruling and its failure to issue findings of fact. On March 9, 1992, counsel for petitioner presented oral argument to the Third Circuit. By judgment order dated March 16, 1992, petitioner's appeal was erroneously dismissed for lack of appellate jurisdiction. In support of the panel's decision to dismiss petitioner's appeal, the panel cited a single case which, based on the record below, makes the panel's ruling contrary to prior rulings of this Court and the Third Circuit.

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2. A copy of the July 18, 1991 transcript is Appendix "H."

On March 30, 1992, petitioner requested an e*n banc* rehearing of the panel's decision. By judgment order dated May 18, 1992, the Court of Appeals denied petitioner's request. Notwithstanding the gross constitutional violations carried out by the government agents against petitioner, and the lack of any competent evidence that the items unlawfully seized were ever abandoned or related to a criminal proceeding "*in esse,*" petitioner has been denied the opportunity for appellate review.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the conduct of the government agents in unlawfully seizing petitioner's property without a warrant violates petitioner's fundamental constitutional rights. Hence, the Third Circuit's refusal to provide petitioner with appellate review of the government's unlawful conduct is contrary to the decisions of this Court and of the United States Court of Appeals for the Third Circuit. The issues in this case are of exceptional importance, to wit, the public interest in deterring unlawful police conduct and guarantying appellate review of erroneous District Court rulings which fail to remedy violations and fundamental constitutional rights.

ARGUMENT

I.

JURISDICTION IN THE COURT OF APPEALS

A. The District Court's denial of petitioner's Rule 41(e) motion for return of property on behalf of an intervenor is a final appealable order pursuant to 28 U.S.C. § 1291, because the record lacks any competent evidence that the items seized are related to a criminal proceeding "*in esse*."

The Third Circuit's refusal to review the District Court's erroneous denial of petitioner's Rule 41(e) motion is in conflict with other courts of appeals and constitutes a significant departure from the usual course of judicial proceedings under similar circumstances. In dismissing this appeal for lack of appellate jurisdiction, the panel relied on *United States v. Furina,* 707 F.2d 82 (3d Cir. 1983). Actually, the facts of this case are significantly different from those of *Furina,* and the panel's ruling directly conflicts with this Court's holding in *DiBella v. United States,* 369 U.S. 121, 82 S. Ct. 654 (1962).

Evidence that appellant's Rule 41(e) motion is tied to an "ongoing" criminal investigation has been recognized by this Court in *DiBella* as a prerequisite to finding that a Rule 41(e) motion was not yet a final order. In *Furina*, the District Court properly conducted an "*in camera*" review of a master affidavit of probable cause that was submitted along with the search warrant.[3] After making such review, the District Court stated a "... viable ongoing investigation was in progress." *Furina*, 707 F.2d at 83. The *Furina* court also required a report of current activity. In the case at bar, not a scintilla of record evidence was developed at the District Court level establishing that any investigation is "ongoing", there is no indication in the record that any indictment will ever be forthcoming. Thus, the Third Circuit's affirmation of the District Court's erroneous ruling here directly conflicts with prior decisions in this and other Circuits. *See Government of Virgin Islands v. Edwards*, 903 F.2d 267 (3d Cir. 1990). In *Edwards*, the appellant filed a Rule 41(e) motion for return of jewelry found in his possession during his arrest. The government contended the defendants should not be entitled to a return of these items citing a "possibility" that he may be prosecuted for the theft of the items. At the time of his appeal, however, there was no evidence presented that any party was coming forth to identify the items as stolen. Based on these facts, the Third Circuit ruled that "... [t]he mere *possibility* of a prosecution does not deprive an order of finality." *Id.* at 272, (emphasis added).[4]

Petitioner submits *Furina* cannot be appropriately applied to him because he participated in the proceedings below solely as an

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3. In *Furina*, the warrant was served *directly* on appellant prior to seizure of his property. Appellants in that case were not, unlike Petitioner, intervenors.

4. In *In re Grand Jury Proceedings*, 716 F.2d 493 (8th Cir. 1983), the Eighth Circuit ruled that the mere fact that suppression of evidence will result from a successful Rule 41(e) motion does not "per se" make such motion tied to a criminal proceeding. Rather, record evidence of such a contention must be established.

intervenor. This is significant because Petitioner's motion was *independent* from the party actually served with the subpoena. The absence of any evidence that petitioner's property is inextricably "tied" to a criminal prosecution makes the District Court's ruling appealable. If there is no criminal prosecution to which petitioner is subject, the matter is final as to petitioner, and therefore appealable by him, because nothing remains to be determined.

In *Furina*, the appellant was served *directly* with a search warrant supported by probable cause. The appellant in *Furina* was *not* before the Court as an intervenor and clearly had an opportunity to seek appellate review of the District Court's denial during a subsequent motion to suppress. This was established through record evidence, requested by the *Furina* Court, which established that appellant was likely to be indicted.

In the case at hand, no warrant has been issued and no affidavit of probable cause has been placed in the record. The panel refused to consider this appeal, notwithstanding the lack of *any record evidence* that appellant's Rule 41(e) motion was tied to a criminal investigation. In *DiBella* the appellant was *arraigned* and released on bail *prior* to the filing of the Rule 41(e) motion. Based on these facts, this Court ruled: "[W]hen at the time of ruling there is outstanding a *complaint*, or a detention or release on bail following *arrest* or an *arraignment, information*, or *indictment*, in each such case, the order on a suppression motion must be treated as but a step in the criminal case preliminary to trial thereof." *DiBella*, 369 U.S. at 130, 82 S. Ct. at 660 (emphasis added).

In *DiBella*, the appellant was not before the Court solely as an *intervenor*: he had been served with a search warrant. Furthermore, the nature of the contraband seized (illegal narcotics) in and of itself established that the appellant's Rule 41(e) motion in *DiBella* was in fact "tied" to a criminal investigation. No such evidence exists here. The Third Circuit's application of *Furina* to petitioner

is also inconsistent with this Court's decision in *Perlman v. United States*, 247 U.S. 7, 38 S. Ct. 417 (1918). In that case, Perlman moved to prevent the government from maintaining possession of evidence which had been introduced in a civil trial in which Perlman was *not* a party. The government intended to use such evidence as part of a perjury investigation which had *not* resulted in an *arrest* or *indictment*. As in the instant case, the government argued that the District Court's order was not final. This Court rejected this argument:

> [T]he second contention of the government is somewhat strange, that is, that the order granted upon its solicitation was not final as to *Perlman* but interlocutory *in a proceeding not yet brought and depending upon it to be brought*. In other words, that *Perlman* was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time in some other way. We are unable to concur.

Perlman, 247 U.S. at 9, 38 S. Ct. at 419 (emphasis added).[5]

The importance of petitioner's status as an intervenor was confirmed by this Court in *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090 (1974). There, the president moved to quash a subpoena issued to a *third party*. The District Court denied this relief, and an appeal was taken to the Circuit Court. Relying on *Perlman, supra*, this Court noted that because the president was before the Court as an *intervenor*, and not likely to subject himself

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5. Although this Court ultimately denied Mr. Perlman's motion because he had *volunteered* the items in question at a previous trial, the Court nevertheless found the District Court's denial to be *final as to Perlman*, in the absence of evidence of a *related* proceeding. *Perlman*, 247 U.S. at 9, 38 S.Ct. at 419.

to contempt, the denial of the motion to quash by the District Court was final as it related to the president. In the instant case, petitioner does not have the option of risking contempt for refusal to comply with the subpoena, because the government *never served him directly*. Rather, the government elected to forcibly seize his records with absolutely no notice to petitioner. Hence, petitioner is only involved in these proceedings as an *intervenor*, and the District Court's denial of his relief is final, absent any evidence that the items which he sought to have returned are "tied" to an "ongoing" investigation.

Lastly, the Third Circuit has denied petitioner the additional protections afforded by the court in *Furina*. There, the Circuit Court affirmed the District Court's extensive efforts to protect the appellant's rights by providing a *reasonable time limitation* within which appellant would have to be advised of the ultimate outcome of the government's investigation. The District Judge ruled: "[A]t some point . . . I intend to draw a line and say to the government you're going to have to indict or acquit." *Furina*, 707 F.2d at 83. In the case *sub judice*, more than a *year and a half* has passed since the issuance of the subpoena, without any proof that an arrest or indictment is imminent.

Petitioner is presently "in limbo." Assuming, *arguendo*, the government never indicts, the Third Circuit's refusal to consider petitioner's appeal relating to the unreasonable search will *preclude* appellate review of the District Court's erroneous decision. Furthermore, the purpose of Rule 41(e) — to deter unlawful police conduct and preserve a citizens' rights to appeal erroneous District Court decisions — will not be served. If this Court refuses certiorari, declines such review of the Circuit Court's decision, and if petitioner is not arrested, he will never be afforded the appellate review necessary to redress the government's unlawful trampling of his constitutional rights.

II.

ABANDONMENT

A. Petitioner's property must be returned because petitioner had not voluntarily abandoned his property and the government failed to obtain a search warrant, but rather attempted to use a grand jury subpoena as a substitute for such a warrant.

Petitioner has standing to challenge the seizure in question pursuant to this Court's decision in *Rakas v. Illinois*, 439 U.S. 128, 99 S. Ct. 421 (1978), which held that a citizen has a right to challenge a governmental seizure as to all places and things where a legitimate expectation of privacy exists.

It cannot be reasonably questioned that petitioner maintained a reasonable privacy interest in the items seized by the government, many of which included privileged communications and private memoranda (App. 49a, 50a). Petitioner's testimony below demonstrated his expectation that his records would remain free from governmental intrusion (App. 50a, 51a, 31a, 26a, 29a). Petitioner first learned that his personal records had been seized on April 29, 1991 (App. 31a). This was *after* petitioner drafted two checks to the landlord, for "storage rent" and a new security deposit. (*See* Appendix I.)

In addition, petitioner hired an attorney, Daniel Bernstein, Esquire, who corroborated petitioner's testimony by further testifying that petitioner repeatedly made attempts to contact the landlord for the purpose of regaining access to the office and his property (App. 25a, 26a, 27a). However, Mr. Seligsohn, who was authorized to permit petitioner's reentry, refused to return petitioner's calls (App. 54a).

The petitioner undertook extreme precautionary measures to maintain his right of privacy by securing all of his records in locked

filing cabinets, locating such cabinets within interior offices, and maintaining possession of the only key.

Petitioner has standing to challenge the seizure in question as a matter of law, based on the District Court's ruling (App. 66a), and the government's stipulation (App. 4a), that the petitioner is properly before the Court as an *intervenor* pursuant to Fed. R. Civ. P. 24(a). These record facts provide a more than sufficient basis for the petitioner to challenge the seizure in question.

The burden of proving abandonment is on the government. *McDonald v. United States*, 335 U.S. 451, 69 S. Ct. 191 (1948). The question of whether or not an individual has abandoned his property, thereby waiving any right to object to an unreasonable seizure thereof, is primarily a question of intent, which may be inferred from words, acts, and other objective facts. *United States v. Cella*, 568 F.2d 1266, 1283 (9th Cir. 1977). An abandonment is a voluntary relinquishment and termination of a known right, an intentional throwing away of property rights, to the extent that one no longer retains a reasonable expectation of privacy therein. *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507 (1967).[6]

In the case *sub judice*, the record is replete with undisputed evidence of petitioner's intention to maintain a vested interest in and possession over his private property. The elevators to the 30th floor had been shut off by the building manager, Mr. Chris D'Erasmo, thereby cutting off petitioner's only means of access to his property (App. 40a). In addition, petitioner repeatedly called Mr. Seligsohn, who was in charge of the building. However, Mr. Seligsohn refused to return his calls (App. 27a). Furthermore, in January and February of 1991, petitioner caused his attorney, Mr.

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6. *Black's Law Dictionary* (4th Ed. 1951) defines abandonment as follows: "[T]he giving up of something absolutely, without regard to what eventually happens to the property, such as throwing a jewel onto the highway." *Id.* at 9.

Bernstein, to commence re-negotiations for the lease, at which time petitioner was incorrectly informed by the landlord that the "status quo" of his property was being maintained (App. 27a).

The governent's argument, accepted by the Third Circuit, that it did not need a search warrant to seize petitioner's property because *he had been involuntarily* locked out by his landlord is, even if true – immaterial since an abandonment is determined by reviewing the *property owner's* (petitioner's) intent, not the landlord's intent. Although there are occasions when the validity of a third party's consent to a search has been upheld, this exception must be applied guardedly to prevent erosion of the protections of the Fourth Amendment. In *United States ex rel. Kabey v. Mazurkiewicz*, 431 F.2d 839 (3d Cir. 1970), for example, the defendant was convicted of aggravated robbery, based on evidence seized inside a garage rented solely by the defendant. Detectives entered the garage, where they located the gun after receiving consent to search from the defendant's wife. Defendant kept the only key to the garage on his key ring and had never permitted the key to be in his wife's possession. Based on the above facts, the Third Circuit ruled "... the search invalid on the grounds that the wife did not have ... authority to consent to the search nor any independent legal right of her own to do so ..." *Id.* at 841.

The facts of the instant case are even more compelling than those of *Mazurkiewicz*, particularly since the government has failed to produce any evidence that the petitioner relinquished his key to the locked filing cabinets. In fact, the government did not even bother to use a key, choosing rather to drill open the locks.

A forcible lock-out by its very nature vitiates any intent to voluntarily abandon the premises, absent proof by the government that petitioner had the financial means to cure the rent arrearage but was willfully refusing to do so. *United States v. Robinson*, 430 F.2d 1141 (6th Cir. 1970). *See also*, *Brodsky v. Phila. Athletic Club*, 277

Pa. Super. 49, 419 A.2d 1285, 1288 (1980). The Third Circuit's ruling erroneously presumes that petitioner willfully refused to pay rent, without any record evidence. To the contrary, the record below contains ample evidence of petitioner's good faith efforts to clear up the possession dispute with his landlord and to maintain his expectation of privacy in the premises.

B. The landlord's unconstitutional use of the distraint statute in locking petitioner out of the premises without notice vitiates any evidence of a willful abandonment.

In *United States v. Hossbach,* 518 F. Supp. 759 (E.D. Pa. 1980), the government took the position that non-payment of rent, coupled with consent of the landlord, constituted an abandonment, and thereby vitiated the requirement that a search warrant be obtained. With respect to the question of the landlord's right to seize the tenant's personal property, the *Hossbach* court stated:

> The landlord does *not* have the right to personal property left on the premises except by way of distraint for rent. Landlord and Tenant Act of 1951, 68 P.S. § 250.320.

(Emphasis added.) In absence of clear proof of abandonment, regardless of the right of the landlord to enter the premises or to permit the DEA agents to enter, the landlord had no right to permit agents to seize, without a warrant, the personal property of the defendant. *Id.* at 768.

As in *Hossbach,* the absence of a formal distraint is significant here.[7] In order to commence a distraint action in Pennsylvania, a landlord must provide *written notice* of any distraint to the

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7. Under Pennsylvania statutory law, a landlord does not own, or have a right to transfer, the tenant's property.

tenant *within five days* after making such distraint. 68 Pa.C.S.A. § 250.302. It is without question that petitioner never received — nor could he have received — notice of the distraint because he could not access the 30th floor of the building[8] (App. 40a).

This Court addressed the validity of a landlord's consent to search the premises of a tenant out of possession in *Chapman v. United States*, 365 U.S. 610, 81 S. Ct. 776 (1961). In *Chapman*, the defendant was convicted of illegally operating a distillery based upon evidence seized by police during a search of premises rented by the defendant. The police officers relied on the consent of the landlord given because he smelled an odor of "whiskey mash" coming from inside the rented premises.This Court held that the evidence should have been suppressed because the officers "... [h]ad an abundant opportunity to obtain a warrant and to proceed in an orderly way even after the odor had emphasized their suspicions; there was no probability of material change in the situation during the time necessary to secure such a warrant."[9] *Id.* at 779-780.

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8. In addition to the landlord's failure to comply with the distraint statute's notice-requirement, the Pennsylvania distraint statute provision for an *ex parte* seizure prior to notifying the tenant has been held to violate due process. *Allegheny Clark Lift Inc. v. Woodline Industries of Pennsylvania, Inc.*, 356 Pa. Super. 269, 514 A.2d 606 (1986).

9. The government has not offered any reasons for its failure to obtain a search warrant, especially in light of the fact that

> "... no suspect was fleeing or likely to take flight .... The search was of permanent premises, not of a moveable vehicle.... [No evidence or contraband was threatened with removal of destruction.]" *Id.* at 81, S.Ct. at 779. In fact, the agents had received assurances from the Binswanger Management that they would *not* dispose of the property without notifying them in advance (App. 19a).

In the instant matter, the government agents' testimony unmistakably established that they had ample time to review petitioner's records. In fact, they made plans to return and seize them the *next day* (App. 13a, 14a, 15a). In *Chapman*, this Court explained why evidence obtained in this fashion must be suppressed:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists from requiring that those inferences be drawn *by a neutral and detached magistrate* instead of being judged by officers engaged *in the often competitive enterprise of ferreting out crime.*

Id. at 779, 81 S. Ct. at 779 (emphasis added).

In the present case, the government agents improperly manipulated the Lewis Tower Building personnel, rather than seeking the approval of a neutral and detached magistrate as required by the Fourth Amendment.

C. The consent to search obtained by the government was invalid because petitioner had been forced out of the premises, and petitioner's property should therefore be returned.

In *United States v. Robinson*, 430 F.2d 1141 (6th Cir. 1970), the court ruled that an abandonment must be clearly shown by the party asserting it, and, though intent may be inferable from actions, an abandonment will *not* be presumed. *Id.* at 1143; *see also, United States v. Minker*, 312 F.2d 632 (3d Cir.), *cert. denied*, 372 U.S. 953, 83 S. Ct. 952 (1963).

In *Robinson,* the defendant's building manager, considered the apartment abandoned because the defendant had been absent, *without having paid any rent,* for over one month's time. Based on the consent of the building manager, FBI agents entered the apartment and seized clothing which was subsequently used as evidence to convict him of armed robbery. On these facts, the Sixth Circuit held the building manager's consent was *invalid,* and that the evidence should have been suppressed. The facts of *Robinson* are directly on point with the instant matter, and the Sixth Circuit's reasoning is persuasive. Petitioner submits, therefore, that the Third Circuit's decision conflicts with prior decisions of the various Circuits and this Court, including *Chapman.*

The government's argument that the petitioner made no efforts to obtain his property until after he had learned of the seizure is not supported by the evidence presented below. For example, prior to the petitioner's knowledge that the items had been seized, he entered into a new settlement to gain access to the property, which included "storage charges" — for property which had already been seized by the government (App. 28a, 29a).[10] Obviously, a tenant would not agree to pay *storage charges* if he had already voluntarily relinquished his rights to that property.[11]

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10. Copies of two checks — one for $28,817, which included storage charges and a second for $9,300 representing a *new* security deposit — are Appendix I, Exhibit "D-2" from the District Court Hearing on August 1, 1991.

11. It should also be noted that in addition to maintaining all of his records in locked cabinets — some of which were privileged litigation records and documents in pending civil actions — the petitioner maintained a working telephone at the location in question during the entire period from the December 17, 1990, lockout through the date of the unlawful search on March 4, 1991 (App. 31a).

D. A separate search warrant should have been obtained by the government to search each separately secured filing cabinet inside petitioner's premises.

A search occurs when there is an infringement of an expectation of privacy that society is prepared to consider reasonable. *United States v. Jacobson,* 466 U.S. 109, 104 S .Ct. 1652 (1984). In *Jacobson,* the government suppressed evidence seized in a search of a separate and secure box in the possession of the defendant, who had been arrested for unlawfully hunting on protected land. This Court held that the search warrant requirement of the Fourth Amendment was applicable to personal luggage taken from automobiles and that, barring exigent circumstances, officers could not conduct a warrantless search of locked luggage. Therefore, the items in the hunting box also were suppressed.[12] *Id.,* 104 S .Ct. at 1658.

The record below is barren of any exigent circumstances. In fact, the agents were so relaxed, after breaking petitioner's door open, that they merely browsed through petitioner's documents and determine to return the n*ext day* to cart his items off to a warehouse (App. 13a, 14a, 15a). The government's final argument in *Jacobson,* also rejected by this Court, was that, since the box in question did not contain a lock, there should have been no expectation of privacy. Here, by contrast, it is undisputed by the parties that petitioner's filing cabinets were *locked* when the agents conducted the search in question.

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12. This Court in *Jacobson* also rejected the argument that the box had been abandoned, citing *United States v. Sanders,* 719 F.2d 882 (6th Cir. 1983). There, a bag and luggage, left at the airport, was held not to be abandoned because the government had failed to meet its burden of proof that the party had intended to relinquish his expectation of privacy in the items seized.

III.

OVERBREADTH

A. The grand jury subpoena demanding all of the records of Amin A. Rashid & Associates was unconstitutionally overbroad because it failed to particularly describe either the items to be seized or the probable-cause basis for the seizure.

The burden is on the government to establish that the seizure complied with the requirements set forth in Fed. R. Crim. P. 41(e) and the Fourth Amendment. *Schneckloth v. Bustamonte,* 412 U.S. 218, 935 S. Ct. 2041 (1973); *United States v. Kane,* 637 F.2d 974 (3d Cir. 1981). It was the government's burden to establish the basis for the issuance of the subpoena, and that it was in fact executed pursuant to requisite constitutional safeguards. *See, e.g., United States v. Quartermain,* 467 F. Supp. 782 (E.D. Pa. 1979). On the record below, the government has failed to meet its burden of proving that the seizure of the petitioner's seizure of the property without a search warrant was lawful.

The Fourth Amendment is applicable to a Rule 41(e) motion since such a motion is to be treated as a motion to suppress under Fed. R. Crim. P. 12. *In Re Grand Jury Proceedings,* 716 F.2d 493 (8th Cir. 1983) (Rosenn, J., sitting by designation). The Fourth Amendment clearly requires a particular description of the place to be searched and the person or things to be seized. The grand jury subpoena at issue provides nothing more than the following broad description: "Any and all documents, files and computerized records of Amin Rashid Associates." The language of this subpoena is so overbroad that it amounts to nothing more than a "general search warrant," and, as such, is clearly an unconstitutional and impermissible act of the government. *Andersen v. Maryland,* 427 U.S. 463, 96 S. Ct. 2737 (1976). Hence, certiorari is appropriate to review the Third Circuit's misapplication of the Fourth Amendment. From the face of the

present grand jury subpoena, it appears that the government merely conducted a "fishing expedition". As stated by this Court, "[A] Grand Jury's subpoena duces tecum will be disallowed if it is far too sweeping in its terms to be regarded as reasonable under the Fourth Amendment." *United States v. Calandra,* 414 U.S. 338, 94 S. Ct. 613 (1974).

The government may not conduct a search solely for the purpose of securing evidence to be used as proof that a crime has been committed. Rather, the Fourth Amendment requires that the reason for the search and the nature of the contraband sought appear in the affidavit which is presented to a neutral magistrate. *United States v. Sigal,* 341 F.2d 837 (3d Cir.), *cert. denied,* 382 U.S. 811, 86 S. Ct. 23 (1969). A grand jury subpoena is not the "[t]alisman that dissolves all constitutional protections." *United States v. Schwartz,* 457 F.2d 895, 898 (2d Cir.), *cert. denied,* 410 U.S. 941, 93 S. Ct 1376, 35 L. Ed. 2d 608 (1973). Petitioner submits that the record below lacks any adequate basis for the issuance of the subpoena,[13] as well as any proof of proper execution thereof.

Searches conducted without a warrant are *per se* unreasonable under the Fourth Amendment, except in a few well delineated and narrowly circumscribed exceptions. *Michigan v. Tyler,* 436 U.S. 499, 98 S. Ct. 1942 (1978). When a person alleges a *deliberate bypass* of the warrant requirement, and there is evidence "... [t]hat a realistic opportunity existed to produce one, the government must come forward with objective evidence tending to justify the deviation from the normal police procedure; subjective good faith on the part of the authorities cannot suffice as a complete defense

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13. Although petitioner refers to the lack of probable cause in relation to the issuance of the subpoena, the circumstances surrounding the execution of this subpoena were tantamount to a full-blown search, requiring a warrant to be issued by a neutral and detached magistrate.

due to failure to obtain a warrant." *United States v. Chuke*, 554 F.2d 260, 264 (6th Cir. 1977). Certiorari should be granted because the Third Circuit's decision below conflicts with sister Circuits on protection of a *fundamental constitutional right.*

In the case *sub judice*, the government agents knew as early as January 25, 1991 (more than a month prior to the search) that petitioner had been forced out of his office at the Lewis Tower Building (App. 9a). Agent Hazelton specifically admitted visiting petitioner at his temporary address, 1424 Chestnut Street, on January 25, 1991 (App. 9a). Because the government had more than a month's time to properly secure a search warrant, but failed to do so, it cannot now credibly claim the existence of any exigent circumstances. In the case *sub judice*, the government has failed to establish any justification for its failure to obtain a warrant, or at a minimum to notify petitioner of the search. The government's conduct constituted an unlawful search and seizure under the Fourth Amendment.

IV.

EXECUTION

A. The government's failure to knock and announce their presence and the purpose of their entry requires the return of petitioner's property under Rule 41(e).

The government below admitted to forcing open petitioner's office door with a screw driver and drilling open his locked filing cabinets (App. 15a).

In the instant case, government agents Hazelton and Williams had a duty to comply with 18 U.S.C. § 3109 (1991), which provides in pertinent part as follows:

> The officer may break open any outer or inner

> door or window of a house, or any part of a house, or anything therein, to execute a search warrant, *if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.*

(Emphasis added.) Absent exigent circumstances, a police officer's failure to wait until he is refused admittance, before breaking open even the front screen door of the defendant's premises, for purposes of executing a search warrant, has been held illegal, and the evidence seized therein during a subsequent search is inadmissible. *United States v. Goldstein,* 416 U.S. 943, 94 S. Ct. 1951 (1972).

In *United States ex rel. Ametrane v. Gable,* 401 F.2d 765 (3d Cir. 1968), police officers had *both* a search warrant and an arrest warrant but failed to announce the purpose of their entry. Instead, the officers inserted a crowbar into the defendant's door, causing the defendant to open the door to avoid further damage. The Third Circuit ruled that the entry was illegal, and the evidence seized thereafter was inadmissible at trial because a person must be given a reasonable opportunity to "... surrender his privacy voluntarily, and police conduct forcibly eliciting such a waiver is unconstitutional." *Id.* at 766. *See also, Commonwealth v. DiMichael,* 442 Pa. Super. 553, 277 A.2d 159 (1971) (lapse of ten to fifteen seconds between the announcement by the police and their unconsented forcible entry was not sufficient).

The purpose of the rules requiring government agents to announce themselves before searching an individual's premises is to protect that person's privacy rights by permitting him to surrender his property with dignity, rather than having it forcibly seized by government agents. *Commonwealth v. Cerulla,* 223 Pa. Super. 24, 296 A.2d 858 (1972). In the instant case, government agents clearly were aware of petitioner's temporary address made

no effort to notify petitioner of their intent to search the subject premises. Finally, the government's failure to permit petitioner to be present during the seizure was a clear violation of petitioner's rights.

V.

FIFTH AMENDMENT

A. The government may not circumvent the safeguards of the Fourth and Fifth Amendments by unlawfully seizing petitioner's records and compelling him to appear and reclaim his records, thereby authenticating contents thereof in violation of the Fifth Amendment.

The United States Supreme Court has often stated "[t]he importance of preserving inviolate the privilege against self-incrimination." *Miranda v. Arizona,* 34 U.S. 436, 86 S. Ct. 1602, (1966); *Malloy v. Hogan,* 378 U.S. 1, 84 S. Ct. 1489 (1964). The Fifth Amendment "... respects a private inter sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation." *Couch v. United States,* 409 U.S. 322, 93 S. Ct. 611 (1973). The privilege against self-incrimination may be invoked by a sole proprietorship in response to grand jury *subpoenas duces tecum* for its business related records. *Matter of Grand Jury Impaneled March 19,1980,* 680 F.2d 327, 321 (3d Cir. 1982). In that case, the Third Circuit was confronted with a similar factual situation to that presently before this Court. The appellee received five separate grand jury subpoenas demanding that he appear before a grand jury and produce certain records. These subpoenas were issued pursuant to a federal grand jury investigation relating to corruption in awarding county and municipal contracts. The recipient of the subpoena was directed to provide "all records relating to two of Appellee's companies, including ledgers, journals, work papers, vouchers, bank

statements, contracts, corporate minutes, etc. . . ." *Id.* at 328.

The Third Circuit upheld the District Court's order quashing the grand jury subpoena with respect to all items relating to the ". . . sole proprietorship of the Appellee, other than copies of his tax returns and W-2 statements which are *required by law to be kept.*" *Id.* at 329. The court further stated: "[I]t is clear that, under the present state of the law, the Fifth Amendment may be invoked by a sole proprietorship regardless of the magnitude of the business. . . ." *Id.* at 330.

Here, because petitioner's records are already (unlawfully) in possession of the government, petitioner is faced with no other choice but to retrieve his personal documents in order to carry on his livelihood, thereby providing the government with incriminating evidence as to authentication. The government's mere assertion that the possession and authenticity of the documents can be proven without the petitioner's testimony is not satisfactory to establish that appellee will be protected in subsequent proceedings. *Id.* at 336

The Fifth Amendment protects the act of producing subpoenaed documents since such act is authenticative and, therefore, incriminating. *Fisher v. United States,* 425 U.S. 391, 96 S. Ct. 1569 (1976). Assuming, *arguendo,* that this Court would not find the contents of petitioner's documents to be privileged, ". . . [t]he mere act of producing the documents may be considered a communication having testimonial significance as an admission that the subpoenaed records exist. . . [thereby authenticating them]." *In re Grand Jury Impaneled (Colucci),* 579 F.2d 851, 861 (3d Cir. 1979). More importantly, the government has not contested that the contents of these papers are potentially incriminating. Therefore, petitioner is not required to present any further evidence to establish that ". . . that the privilege is properly claimed." *In re Grand Jury Impaneled (Markowitz),* 603 F.2d 469,

477 (3d Cir. 1979).

The "... Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony." *Bellis v. United States*, 417 U.S. 85, 87, 94 S. Ct. 2179, 2182 (1975). In the case of *In re Grand Jury Proceedings*, 632 F.2d 1033 (3d Cir. 1980), the Third Circuit declined to enforce a grand jury subpoena requesting production of "... an appointment book for the years 1979, 1980, ...[from a defendant under investigation] ... because production [thereof] would violate his Fifth Amendment rights...." *Id.* at 1042. In the case *sub judice*, many of the documents seized by the government involved private, privileged and personal documents that were seized unlawfully.[14] (App. 48a). Therefore, this Court should grant the within petition to afford petitioner with appellate review of the Third Circuit's erroneous holding.

Although petitioner sometimes operates under the letterhead Amin A. Rashid & Associates, Inc., he conducts his business as a sole proprietor. In fact, on March 1, 1991 (three days before the search), the State of Delaware terminated the legal entity known as Amin A. Rashid Associates, Inc. Furthermore, if "... incriminating documents [are] held in an individual capacity, as opposed to a representative capacity [this] prevents the Government from subpoenaing [those documents]...." *United States v. (Under Seal)*, 475 F.2d 834, 840 (4th Cir.), *vacated as moot*, 471 U.S. 1001, 105 S. Ct. 1861, 85 L. Ed. 2d 155 (1985). Although the Fifth Amendment generally does not apply to the contents of documents which were voluntarily prepared, unless they are private or privileged, *coerced production* of such documents by the

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14. Appellant also maintains that a number of the documents seized by the government are covered by the attorney/client privilege. These should be returned to prevent further unwarranted disclosure thereof (App. 48a).

government, to provide evidence of authentication, is clearly violative of the Fifth Amendment.[15] To permit the government to extract this type of authentication would be to allow it to do "indirectly" that which it is prohibited from doing "directly."[16]

CONCLUSION

For the foregoing reasons, and in order to provide appellate review of the government's gross violation of petitioner's fundamental rights and the Third Circuit's approval thereof, petitioner respectfully requests this Court to grant petitioner's request for certiorari.

Respectfully submitted,

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15. *See Fisher, supra.*

16. Petitioner acknowledges that his Fifth Amendment assertions will become moot if this Court grants petitioner's Rule 41(e) motion, because all such evidence would thereafter be inadmissible in any subsequent criminal proceeding. *In re Grand Jury Proceedings*, 716 F.2d 493 (8th Cir. 1983).

APPENDIX A — ORDER OF THE THIRD CIRCUIT COURT OF APPEALS EN BANC DENYING PETITIONER'S REQUEST FOR REHEARING ISSUED MAY 18, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1729

IMPOUNDED

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 90-00844-2)

SUR PETITION FOR REHEARING

PRESENT:

SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and HIGGINBOTHAM, *Circuit Judges*

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Appendix A

s/ William D. Hutchinson
Circuit Judge

Dated May 18, 1992

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* Senior Circuit Judge Higginbotham was limited to voting for panel rehearing.

APPENDIX B — ORDER OF THE THIRD CIRCUIT COURT OF APPEALS DISMISSING PETITIONER'S APPEAL FOR LACK OF JURISDICTION ISSUED MAY 16, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1729

IMPOUNDED

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 90-00844-2)

District Judge: Honorable Ronald L. Buckwalter

Argued: March 9, 1992

PRESENT: HUTCHINSON, ALITO, and HIGGINBOTHAM,
Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the appeal is dismissed for lack of appellate jurisdiction. *See United States v. Furina*, 707 F.2d 82 (3d Cir. 1983).

Costs will be taxed against appellant.

By the Court,

Appendix B

s/ William D. Hutchinson
Circuit Judge

ATTEST:

s/ Sally Mrvos
Sally Mrvos, Clerk

Dated March 16, 1992

APPENDIX C — ORDER OF THE DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DENYING PETITIONER'S RULE 41(e) MOTION ISSUED AUGUST 8, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GRAND JURY NO. 90-844-2

AMIN A. RASHID

v.

UNITED STATES

ORDER

AND NOW, this 8th day of August, 1991, after a hearing having been held and upon consideration of the briefs filed by the parties hereto, the motion and supplemental motion for return of seized property pursuant to Rule 41(c) of the Federal Rules of Civil Procedure are DENIED.

BY THE COURT:

s/ Ronald L. Buckwalter
RONALD L. BUCKWALTER, J.

[stamped]
A TRUE COPY CERTIFIED TO FROM THE RECORD
DATED: 8/8/91
ATTEST: s/ Mary L. McKenna
Deputy Clerk,
United States District Court
Eastern District of Pennsylvania

APPENDIX D — TRANSCRIPT OF DISTRICT COURT HEARING BEFORE HONORABLE JUDGE BUCKWALTER GRANTING PETITIONER INTERVENOR STATUS RECORDED JULY 18, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NO. GJ 90-844-02

Philadelphia, Pennsylvania
July 18, 1991
9:00 a.m.

RASHID

Plaintiff

v.

UNITED STATES OF AMERICA

Defendant

HEARING
BEFORE THE HONORABLE RONALD L. BUCKWALTER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: ALAN A. TURNER, ESQUIRE
Rutter, Turner, Solomon & DiPiero
Suite 750, The Curtis Center
Independence Square West
Philadelphia, PA 19106

Appendix D

For the Defendant: THOMAS SUDDATH, ESQUIRE
Assistant U.S. Attorney
Room 3310, U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Audio Operator: Lisa McFarland

Transcribed by: Paula L. Curran

(Proceeding recorded by Electronic Sound Recording; transcript produced by computer-aided transcription service.)

[2] (Whereupon the following occurred in open court at 9:00 o'clock a.m.)

THE CLERK: All rise.

THE COURT: Good morning. Please be seated.

ALL: Good morning, your Honor.

THE COURT: I understand there is some need for testimony here?

MR. SUDDATH: Well, your Honor, good morning. Thomas Suddath on behalf of the Government. If I could be heard briefly, your Honor, I believe I might be able to expedite matters.

THE COURT: All right.

MR. SUDDATH: Your Honor, there have been numerous pleadings that have been filed with the Court regarding the —

Appendix D

Mr. Rashid's motion for return of property. Notwithstanding the numerosity of the pleadings, the Government's position is that this matter simply rests on the issue of whether or not the documents that were obtained were properly obtained pursuant to a Grand Jury subpoena issued to a third party, who is in possession of the documents where the Government was not involved in having the third party gain possession of the documents which were subsequently obtained from the Grand Jury subpoena.

If so, the Court answers that question affirmatively, then there is no need to address the issues of [3] -- for which testimony would be presented, specifically, the issues of abandonment, distraint, constitutionality of the distraint statute, et cetera. As the Government understands Mr. Rashid's motion, it's based upon a Fourth Amendment claim that his Fourth Amendment rights were violated, allegedly because the Grand Jury subpoena that was issued was a protectural Grand Jury subpoena, done in an effort to cover up an alleged, warrantless search of third party premises.

In the Government's brief it cited numerous cases from the Supreme Court and from the Third Circuit.

THE COURT: Is this a shortcut? And even if your position is correct, doesn't — isn't there a requirement that testimony be presented here if the party challenging the seizure wished to challenge it?

MR. SUDDATH: Well, there may be a requirement for some testimony to be presented, but not on the issues of abandonment and not on the issues of distraint and not on the issues of the landlord. Simply, the Government would submit that the factual issues that the Court must decide is simply whether or not there

was any Government wrongdoing or complicity in the third party gaining access or possession of the records which were subpoenaed by the Government. The Government could either proffer that testimony or put an agent on for very brief testimony on that issue.

If the Court decides after hearing that testimony [4] that there is no Government complicity or wrongdoing, then under the cases cited by the Government in its brief this issue can be decided on that basis and there is no need to get into the issues of abandonment or the distraint or the constitutionality of the Pennsylvania Distraint Statute.

That's the Government's position with regard to this matter. If the Court would like, I could either proffer testimony or put an agent on the stand.

THE COURT: Now, let me hear what Mr. Turner has to say here before we go any further. Mr. Turner?

MR. TURNER: Good morning, your Honor. For the record, Alan Turner on behalf of movant and intervenor, Mr. Rashid.

First, let me say, your Honor, that I have not yet received and I think, the Government has not filed an opposition to the petition for intervention. Mr. Suddath may, in fact, have determined to consent to our intervention in the subpoena. I don't want to state his position, so.

MR. SUDDATH: Your Honor, for the purposes of this hearing, the Government will — will not close his motion for intervention because under authority from the Third Circuit, I believe Mr. Rashid may properly served grounds for intervention in this matter.

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THE COURT: All right.

MR. TURNER: Thank you, Mr. Suddath. Your Honor, [5] let me begin compilation of today's record, if I might, by reciting three stipulations of fact which Mr. Suddath and I have entered into, which may advance and shorten the inquiry.

Number one, the Tranol(ph) subpoena, which is the subpoena affixed as an exhibit and under which authority is claimed, no notice of that subpoena was given to Mr. Rashid or to Ahmin A. Rashid and Associates, a proprietorship. That subpoena — I'm sorry.

Number two, a separate and distinct Grand Jury subpoena was served upon Mr. Rashid at his office at 1424 Chestnut Street, Philadelphia, Pennsylvania, on February 4, 1991. This, of course, your Honor, is after the lock-out of the December 17, 1990 and is in advance of the Government's seizure or acquisition of the Rashid and Rashid and Associates records on March 5 or March 6 or March 5, depending upon how one views the critical dates.

The third stipulation is that Government agents of unknown identity to me, found three locked pieces of furniture containing documents, two of which were file cabinets, one of which was a bookcase. And the locks were drilled by Government agents, so as to gain access to the contents of the file cabinets and the bookcase.

Is that correct, Mr. Suddath?

MR. SUDDATH: That's correct, your Honor. Of the pieces of furniture that were containing documents, there [6] were a total of 17 pieces of furniture. Three of the 17 were locked and the

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Government gained access to these by drilling locks. Each of these pieces of furniture, to my understanding, was the property of Binswanger, the leasing and management agent for the landlord.

THE COURT: Is that part of the stipulation?

MR. TURNER: That is not part of the stipulation.

THE COURT: Okay. That's okay.

MR. TURNER: Mr. Suddath's comments are not part of the stipulation, no.

THE COURT: All right.

MR. TURNER: Your Honor, with respect to the law applicable, I have present in court witnesses so as to establish that there was no abandonment of property by Ahmin A. Rashid or Ahmin A. Rashid and Associates, and I am prepared to present that testimony today.

Those witnesses consist of two lawyers, a rental agent for the property and the building manager, each of whom, I believe, have evidence which bears upon that question and will demonstrate Mr. Rashid's continuing efforts to regain possession of the questioned records.

The Government take the position that the abandonment issue —

THE COURT: Is that the only witnesses you have? As far as —

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[7] MR. TURNER: Yes, although those, at least one of those witnesses will also discuss, at least briefly, his observations concerning the gaining of access to the records by the Government agents. That relates, your Honor, to the second point which is whether a subpoena, such as that, was issued in this case, the Tranol subpoena implicates the Fourth Amendment concerns. We, of course, take the position that under *Hosback,* in this district, Judge VanArtsdalen and under *Barr* and *Numu*(ph), each of which are cited and discussed somewhat extensively in the moving papers and specifically the second brief of Mr. Rashid, the consolidated memorandum. We will demonstrate, we think, that what we have here is not subpoena compliance but rather a search and a seizure. And I think we need evidence to build a record on that, your Honor.

THE COURT: All right, now —

MR. TURNER: I'm aware that the Court has a trial schedule to commence at 9:30 —

MR. TURNER: Yeah.

MR. TURNER: — And I'm, of course, at the Court's convenience in respect to a hearing.

THE COURT: Yes, that's the only concern I have, here, is that we — I thought, based on some communication last week, about this case, it wasn't going to be testimony taken or I would have continued this.

[8] MR. TURNER: Oh, that wasn't with me, your Honor. I got no communication from your Honor's chambers.

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THE COURT: Did — were you in communication with my chambers?

MR. TURNER: No, not at all, your Honor.

THE COURT: Oh, well, then maybe, there was a misunderstanding here.

MR. TURNER: I think I can explain what happened. A Mr. Boccheto(ph) has been engaged by Mr. Rashid to pursue an appeal, your Honor. The caption of that case is *Public Savings Association versus Rashid,* pending in the Superior Court of Pennsylvania. Those files were part of the seizure. Interestingly, of course, this subpoena to Tranol, requested the records of Rashid and Associates, but of course, the file of Rashid as a defendant in Public Service would not be a Rashid and Associates file, pertinent, of course, to the seizure issue.

THE COURT: Okay, I understand now. I understand what has happened and why there was a mix-up. And it was a mix-up on my part and they —

MR. TURNER: But he needed a file to file a reply brief. My apologies, your Honor.

THE COURT: — well, the unfortunate part of that is, that I, therefore, did not expect to have a hearing and testimony today. And it would be my inclination that it [9] would be more appropriate to re-schedule this at a fixed time. And then we'll be prepared to take testimony. And from what you're telling me, we need a morning, we ought to set aside, at least, a morning.

MR. TURNER: I think it's going to take a morning, Judge,

to build a record on this case —

THE COURT: That, at least, would —

MR. TURNER: — so that the Court can properly consider my side of it.

THE COURT: — yeah, okay. So, I think that that would be the better way to do it than try to rush this thing through. And I'll have to consult my deputy clerk as to an appropriate time.

MR. TURNER: All right, well, I'll just re-issue the subpoena, as previously issued then, to re-collect the witnesses.

THE COURT: When you find out when the hearing is going to be.

MR. TURNER: After I find out what the date is.

THE COURT: Obviously, yes.

MR. TURNER: If I knew the date, I was going to ask if the Court might indulge me by directing such witnesses to be present, but, if that's not convenient for the Court, I'll simply —

THE COURT: I'll tell you, it might be difficult to [10] do that because of the length of this trial and some other matters that are going on. So, I'll just have to set, after I discuss it with my courtroom deputy, we'll set the time again.

MR. TURNER: And of course, our apologies for the misunderstanding of scheduling this morning, your Honor.

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THE COURT: Well, that's all right, you don't have to apologize, that was just a misunderstanding and we'll re-schedule the hearing.

MR. TURNER: Very well. We'll look forward to seeing you at that time, Judge.

THE COURT: All right. All right, thank you.

(Court adjourned at 9:20 o'clock a.m.)

CERTIFICATION

I hereby certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

s/ Geraldine C. Laws 8/21/91
Geraldine C. Laws
Laws Transcription Service

s/ Paula Curran
Paula Curran

APPENDIX E — TRANSCRIPT OF DISTRICT COURT HEARING SUR RULE 41(e) MOTION BEFORE THE HONORABLE JUDGE BUCKWALTER RECORDED AUGUST 7, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NO. GJ 90-844-02

Philadelphia, Pennsylvania
August 7, 1991

AMID RASHID

v.

UNITED STATES OF AMERICA

GRAND JURY HEARING
BEFORE THE HONORABLE RONALD L. BUCKWALTER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: ALAN TURNER, ESQUIRE
Suite 750, The Curtis Center
Independence Square West
Philadelphia, PA 19106

For the Government: THOMAS SUDDATH, ESQUIRE
Assistant U.S. Attorney
3310 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

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Audio Operator: Jacqueline Knoll

Transcribed by: Grace Williams

(Proceedings recorded by Electronic Sound Recording; transcript produced by computer-aided transcription service.)

[2] (Whereupon the following occurred in open court at 1:35 o'clock p.m.:)

THE COURT: Good afternoon. Please be seated.

MR. TURNER: Good afternoon, your Honor.

MR. SUDDATH: Good afternoon.

THE COURT? Are we ready to proceed with testimony?

MR. TURNER: We are, your Honor.

MR. SUDDATH: We are, your Honor.

THE COURT: Okay, call your witness, witnesses.

MR. SUDDATH: Your Honor, I guess the Government will proceed first.

THE COURT: You may proceed first.

MR. SUDDATH· Your Honor, the Government calls Special Agent Carol Hazelton.

Your Honor, I would ask for sequestration at this time.

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THE COURT? All witnesses who are testifying are sequestered.

MR. TURNER: Your Honor, of course, Mr. Rashid —

THE COURT: Government as well as defense witnesses.

MR. TURNER: I'm sorry?

THE COURT: Government of course as well as defense witnesses will be sequestered.

MR. TURNER: But of course Mr. Rashid may remain in the courtroom, your Honor?

[3] THE COURT: He may remain.

MR. TURNER: In that event I would ask that Special Agent Williams of the FBI be sequestered.

THE COURT? All right, if she's going to testify.

CAROL HAZELTON, Government Witness, Sworn.

THE AUDIO OPERATOR: Please be seated. State and spell your full name for the- record.

THE WITNESS: Okay, my full name is Carol C-a-r-o-l Hazelton, H-a-z-e-l-t-o-n.

MR. SUDDATH: Your Honor, one preliminary matter. It may not apply at this point, but just out of an abundance of caution, the Government would request closure of the proceedings

under Federal Rule of Criminal Procedure 6(E) to the extent it's necessary to prevent disclosure of matters occurring before the Grand Jury.

As I look about the courtroom, we do have a legal intern from the United States Attorney's Office present, but I just wanted the record to be clear that the Government is requesting that.

MR. TURNER: I have no objection to that procedure, your Honor, but I would ask that an order be entered allowing counsel to obtain a copy of the transcript of these proceedings. I had a bit of a problem with that, as the Court may be aware, last time.

THE COURT: Well, I'm not aware of what problem you [4] had with that, but if you have to file a motion to do so, go ahead.

Let's proceed with the hearing here, gentlemen, let's go.

MR. SUDDATH: Your Honor, may I just digress for one more brief moment? The Government has filed several pleadings in this case and Mr. Turner has also filed several pleadings? As the Government set forth in its supplemental pleading, in the Government's view the issue before the Court is narrow and the case of the *Burrell* case or *Burrell* case from United States Supreme Court controls this matter.

I have — I could sculpture the agent's testimony to be limited to that issue or expand it, depending upon the Court's view of whether the proceedings should get into the issues of the abandonment, strength, constitutionality of the statute? As the Government set forth in its supplemental motion, we believe the issue is very narrow and should the Court decide that the propert

issue is very narrow and should the Court decide that the property that was obtained by the Government —

THE COURT: Well, let me just put it this way: unless I can be convinced otherwise, I think the issue is narrow, also, so you may proceed as you deem appropriate in introducing testimony.

MR. SUDDATH: Thank you, your Honor.

DIRECT EXAMINATION

[5] BY MR. SUDDATH:

Q. Could you please give your full name? A. Carol Hazelton.

MR. TURNER: Judge, for the record, my apology. I have a slight hearing deficit and when I can't see the speaker, it's more difficult for me to understand. I didn't understand your last ruling, for example.

THE COURT: He was in your way anyway, the way that was positioned, so I think it's appropriate to move it. Okay.

MR. TURNER: Thank you.

BY MR. SUDDATH:

Q. Ms. Hazelton, where are you employed? A. At the U.S. Postal Inspection Service in Philadelphia.

Q. And how long have you been so employed? A. A little over six years.

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Q. Are you one of the case agents in the present case? A. Yes, I am.

Q. And did you have occasion to serve a Grand Jury subpoena upon an individual in this case? A. Yes, I served it on Jeff Seligsohn of Binswanger and that was on February 25th of '91.

Q. Let me hand you what has been marked for identification as Government Exhibit No. 2.

Can you identify that, please? [6] A. Yes, that is the subpoena that I served on Jeff Seligsohn.

Q. Okay, and this was February 25th? A. That's correct.

Q. And who is Jeff Seligsohn? A. He was a sales rep, I'm not certain of his exact title, but he was the liaison between Binswanger and the Lewis Tower Building.

Q. Okay? And during the course of your investigation, did you have occasion to learn when Mr. Rashid had been evicted from the 30th floor of the Lewis Tower Building? A. Yes, I did, it was December 17th of '90.

Q. And when did you first learn of the existence of the documents which were located in the 30th floor of the Lewis Tower Building? A. I heard first about it on January 25th of '91, an individual called and provided this information. I confirmed it January 30th of '91 when I spoke to Jeff Seligsohn of Binswanger.

Q. Okay. When did you first enter the premises of 30th floor of the Lewis Tower Building? A. It was March 4th of '91.

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Q. Prior to that time had you requested of Mr. Seligsohn or of anybody to obtain copies of any of the documents located? A. No, I did not.

[7] Q. Okay. Did you request to receive the documents themselves as opposed to getting copies? A. Prior to March 4th?

Q. Prior to March 4th, that is correct? A. No, I did not.

Q. Did you ever see the documents prior to March 4th, 1991? A. No. I did not.

Q. And how was it that you entered the 30th floor of the Lewis Tower Building on March 4th, 1991? A. When I served the subpoena on Jeff Seligsohn, he gave me the phone number to Chris D'Erasmo or Jackie. He told me that they were the building management of Lewis Tower Building. He told me he would advise them that I would be calling and to arrange an appointment with him. I did so, it was set for March 4th. Chris D'Erasmo let us up and — "us" is myself and Special Agent Williams.

Q. And during the course of your investigation did you tell anybody not to give these documents to Mr. Rashid? A. No, I did not.

Q. Okay. Did you ever tell anybody not to tell Mr. Rashid of the existence of the Grand Jury subpoena? A. No, I did not.

Q. Okay. Did you ever threaten anybody? A. No, I did not.

Q. Did you ever attempt to coerce or intimidate any of the

[8] individuals who were involved in obtaining the documents? A. No, I did not.

MR. SUDDATH: Your Honor, that's all the questions I have.

THE COURT: Cross-examine.

MR. TURNER: Thank you very much, your Honor. May I do so from counsel table?

THE COURT: Yes, you may, as long as you speak into a microphone.

MR. TURNER: I will do so and keep my voice up also, Judge.

CROSS-EXAMINATION

BY MR. TURNER:

Q. Good morning — or good afternoon, Inspector Hazelton? A. Good afternoon, Mr. Turner.

Q. From whom did you hear that property remained on the 30th floor of the Lewis Tower Building on January 25, 1990? A. It was a person calling regarding a complaint against Mr. Rashid.

Q. And what did they say, please? A. This person advised me that they had tried to locate Mr. Rashid by going to the Lewis Tower Building and had found that he was no longer there. Apparently someone at the Lewis Tower Building had told this person that he had been evicted because of nonpayment of rent and provided a new address [9] which was 1424 Chestnut Street.

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Q. So that as of even January 25, 1991, a month before you served the subpoena on Binswanger-Tranel in the person of Mr. Seligsohn, you knew Mr. Rashid's business address, is that correct? A. Well, that is the first I heard of it, yes? And —

Q. And in fact you went to visit Mr. Rashid at his new address during the month of February 1991, is that correct? A. That is correct.

Q. And that was prior to either the issuance or the service of the Grand Jury subpoena that was issued — I'm sorry — Government Exhibit 2 before you today, his that correct? A. That's correct.

Q. May we understand that you did or you did not tell Mr. Rashid that the Grand Jury was seeking his records? A. That's correct, I did not.

Q. Why not?

MR. SUDDATH: Objection.

THE COURT: What's the basis of the question? I don't know that her motive matters, if she didn't do it.

MR. TURNER: I'm sorry?

THE COURT: I don't know that her motive matters. The fact is she did not tell him. That's the answer that is important.

MR. TURNER: No, your Honor.

[10] THE COURT: I'll sustain the objection.

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BY MR. TURNER:

Q. Now, did the person with whom you spoke on January 25, 1991, describe for you the records, if any, which had been left in the Lewis Tower Building? A. The person didn't have any information as to if anything was left.

Q. And then you first spoke with Mr. Seligsohn on January 30, is that correct? A. That's correct.

Q. Well, did you ask Mr. Seligsohn what was there? A. Yes, I did.

Q. And what did he tell you? A. He said he didn't know, but he knew that files were left of Amin Rashid and Associates.

Q. But he didn't know what files? A. He didn't — he didn't know any details about the contents.

Q. Did he know whether — withdraw that. Did he tell you that only Amin Rashid and Associates' files and records were left on the 30th floor of the Lewis Tower Building or as he not even able to tell you that, Inspector Hazelton?

MR. SUDDATH: Objection.

THE COURT: What's the basis of your objection?

MR. SUDDATH: Hearsay, your Honor.

[11] THE COURT: Well, it's all been hearsay, but I'll overrule the objection. Go ahead.

THE WITNESS: He didn't know what was left in the Lewis Tower Building.

BY MR. TURNER:

Q. So that we might understand the chronology then, you spoke with an unidentified person and then Mr. Seligsohn in late January. You spoke — you learned of Mr. Rashid's address and personally visited Mr. Rashid during the middle of the month of February, correct? A. That's correct.

Q. And during that visit you didn't tell Mr. Rashid that you sought the records, correct? A. Correct.

Q. But then on February 28 you served a subpoena on Mr. Seligsohn for all of the files and records, documents and computer records of Amin Rashid and Associates, Correct? A. That's correct.

Q. Now, we understand that at no time, either before or after service of the subpoena or before or after gaining the records, you advised Mr. Rashid of your desire to obtain the records or the fact that you had in fact obtained the records, is that correct? A. That's correct.

Q. So now you went in to the Lewis Tower Building on March [12] 4, 1991, to the 30th floor for the first time, is that correct? A. That's correct.

Q. Do you recall how it was you got to the 30th floor? A. Chris D'Erasmo, the building manager, took us up and — via elevator, that's the only way to gain access to it.

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Q. And so that the Court may understand a physical description of the premises, the 30th floor of the Lewis Tower Building doesn't really have a corridor with an entrance door to the suite of offices, is that correct? A. That's correct.

Q. In other words, once you get off the elevator you're in a reception area and then the private offices are around the perimeter, is that correct. A. Correct.

Q. When you went up to the 30th floor of the Lewis Tower Building on March 4, 1991, were the doors to the private offices open or closed? A. I really don't recall exactly.

Q. Did you go into the private offices on March 4, 1991? A. Yes. None of them were locked. The — I just recall getting access to them without a problem.

Q. Could you tell by observation or otherwise whether at some point in time the private offices or at least certain of them had locks on the doors which had been forced? [13] A. I don't recall seeing any locks that were forced. That's the best of my recollection.

Q. Would it be the case that while you were in the Rashid premises on March 4th that you observed a variety of file cabinets? A. That's correct.

Q. And were some of them locked? A. Some of them were locked.

Q. Did you actually look at any pieces of paper on March 4th? A. Just flipping through it to see the quantity. We were trying to gauge what it would take as far as number of boxes.

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We tried to plan the logistics so that we would pack it up the next day and move it out, so we were just trying to guess volume. So that was the purpose of, that was a look, kind of look-see type of deal; we spent about an hour there. Did you see any records which you felt might not have een Amin A. Rashid and Associates records?

MR. SUDDATH: Objection.

THE COURT: Basis of your objection?

MR. SUDDATH: We're going beyond the scope of the direct examination.

THE COURT: We — yes, we're getting way beyond the scope of the direct examination, but she could be called, I assume, as his witness, so I'll permit this questioning. Go [14] ahead.

MR. TURNER: Thank you very much, your Honor.

THE WITNESS: I'm sorry, could you repeat that?

BY MR. TURNER:

Q. While you were reviewing the records on March 4, 1991, on the 30th floor did you observe any records which appeared to be records not of Amin A. Rashid and Associates — A. No —

Q. — but of Mr. Rashid personally or any other person or entity? A. On March 4th I didn't review more than just looking for quantity, I don't recall that, and on March 5th is the time we went through it much more carefully as we were logging it into, you know, putting into boxes and noting on the exterior

of the box what was being taken. And I don't recall anything that did not belong to Mr. Rashid.

Q. I'm sorry, to Mr. Rashid or Amin A. Rashid and associates? A. Amin A. Rashid and Associates.

Q. On March 4 you don't recall anything along those lines? A. No. March 4th, I — what I was trying to explain is we didn't review any of the files, other than taking a quick look-see to see just number of file cabinets, how full the drawers were and that type of thing, just trying to quesstimate how much — how many boxes we would need the next [15] day.

Q. Could you open all of the file cabinet drawers? A. Well, we did. Three of the file cabinet drawers were locked and since Jeff Seligsohn had advised us that beforehand, we had brought along two techs from my office and they brought drills. And what we did was ask Chris D'Erasmo initially if we could remove the file cabinets with the files in them. He said that some of the furniture belonged to Binswanger as well as some of the file cabinets. He requested that we not do that and he gave us permission to drill the three file cabinets that were locked.

Q. Well, did he tell you that the three file cabinets that were locked were each owned by Binswanger or — A. Well —

Q. — Tranel or the Lewis Tower Building?

THE COURT: Excuse me. Mr. Turner, where are you going on this examination? I mean, I understand your petition here, but I think you're rambling all over the place on this.

MR. TURNER: Oh, I'm sorry, I certainly don't mean to do that, Judge.

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THE COURT: Well, I know you don't, but I'm wondering what you're doing here other than just conducting an examination for I don't know what reason. I mean, I understand the content of your petition here and I'm [16] following it to see whether or not you're proving things that are in there which I think you already have proven that they went in there, the papers and so forth. I don't understand what the purpose is of your continuing questioning of this witness.

MR. TURNER: It is our position as a factual matter, Judge, that certain of the file cabinets which were drilled were in fact not owned by Binswanger indeed but owned by Mr. Rashid.

THE COURT: Well, of course, your client can testify to that as well as —

MR. TURNER: He can.

THE COURT: Huh?

MR. TURNER: He can, but I suppose part of it then may turn depending upon how the Court cares to — chooses to view this subpoena/4th Amendment issue as turning on the intent of the Government. If the Court is of a mind that intent is not pertinent, then my inquiry may be somewhat more focused.

THE COURT: I think you ought to get more in focus. I don't think the intent is really important in the determination here of this issue.

MR. TURNER: Very well, your Honor.

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BY MR. TURNER:

Q. Would it be accurate to say that until you opened the [17] file cabinets, either on March 4 or some other day, that you did not know the contents thereof? A. That's true.

Q. Did anybody from Binswanger ever advise the United States or you, so far as you are aware, that either Binswanger or Tranel was the owner of the personal property left inside the Rashid premises on the 30th floor? A. The only person I spoke with at Binswanger-Tranel regarding that was Chris D'Erasmo and he advised me that Binswanger owned the furniture and some of the file cabinets and he wasn't certain of the — which exact pieces of furniture. He didn't have an inventory list with him at the time, but I think what he — I mean, he advised us, he gave us permission to drill the file cabinets and requested that we not remove any of the file cabinets. At that point in time he had possession of everything in the suites and I believe that that was the basis for his providing — giving us permission to drill the cabinets.

Q. I'm sorry, I perhaps didn't put the question well. Did Mr. D'Erasmo or Mr. Seligsohn or any other representative of Binswanger or Tranel ever tell you — A. Mm-hmm.

Q. — that Binswanger or Tranel owned the personal property such as the files, records and computers and computer records — [18] A. Oh, I'm — now I understand you. No, sir.

Q. — which were inside the 30th floor? A. No, sir, I was just focusing on the furniture.

Q. Were any of the file cabinets which were not locked —

I'm sorry, withdraw that. Were any of the file cabinets locked but opened by means other than by drilling, that is by simply giving a yank — A. Mm-hmun.

Q. — and forcing them open? A. I'm sorry, sir, I didn't understand the question.

Q. You've told us that three file cabinets were locked and drilled. What I'm asking you is were there any other file cabinets which were locked but which were opened by the Government by some means other than the use of a drill? A. Oh, no, sir, the other ones were open.

Q. As between you and Mr. Seligsohn — A. Mm-hmm.

Q. — when you first spoke with him on January 30, whose idea was it for the Government to get the records via a subpoena?

MR. SUDDATH: Objection.

THE COURT: Basis for your objection?

MR. SUDDATH: Relevancy, your Honor.

THE COURT: What's the relevancy of this, Mr. Turner?

[19] MR. TURNER: Well, the *Barr* case, your Honor, says that the totality of the circumstances must be considered, so I'm simply trying to develop a full record as to whether the subpoena was the proper procedure under these circumstances to be used, so I'm trying to put the circumstances before the Court.

THE COURT: All right, you may answer the question.

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MR. TURNER: Thank you, your Honor.

THE WITNESS: Okay. If I understand the question correctly, it was did Jeff Seligsohn or myself bring up — I'm sorry, rephrase the question?

BY MR. TURNER:

Q. Let me re-put the question to you, Inspector. A. Yeah, thank you.

Q. As between you and Mr. Seligsohn — A. Mm-hmm.

Q. — who first mentioned the use of a subpoena? A. On January 30th I don't believe it came up at all. I told him — well, my question to him at that time was what do you intend to do with the records. And he didn't seem to have an exact answer, but he said at some point in time they would dispose of them. My request to him was "I will be getting back to you. Please advise me if you are going to dispose of them, and I left it at that. It wasn't until a later conversation that I advised him that — it was my initiative, [20] I said I would obtain a subpoena, but I first needed to speak to the landlord — the lawyer, I'm sorry, that handled the landlord-tenant complaint. But Jeff Seligsohn never brought up subpoena in any of my conversations with him, it was my — it was my telling him that the Government intended to subpoena the documents.

MR. TURNER: I have no further questions of you this afternoon, Inspector Hazelton, thank you.

THE COURT: All right. Anything else?

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MR. SUDDATH: No questions, your Honor.

THE COURT: You may step down, Agent.

(Witness excused.)

THE COURT: You may call your next witness.

MR. SUDDATH: Your Honor, that's the totality of the Goverment's case.

THE COURT: All right.

MR. SUDDATH: At this point.

THE COURT: All right, now, Mr. Turner, you may proceed by calling your witnesses.

MR. TURNER: Thank you very much, your Honor.

For the record, your Honor, the first witness will be Daniel Bernstein, Esquire, a member of the Philadelphia Bar.

THE COURT: All right.

MR. TURNER: Mr. Bernstein, will you please have a [21] seat on the witness chair?

MR. SUDDATH: Your Honor, may I ask for an offer of proof?

MR. TURNER: Your Honor, through Mr. Bernstein, if you would care to hear an offer of proof, I intend to establish facts

pertinent to the Government's claim in its moving papers that Mr. Rashid abandoned these goods which were later either subpoenaed or seized by the United States, so I intend to overcome the allegation of abandonment.

THE COURT: Fine.

MR. TURNER: I will tell you, however, your Honor, that in my view, in my legal view the issue of abandonment is one which the Government must first establish and must carry the burden on at all times. But I want the record to be complete because I'm not — it's a little hard to tell in the context of this hearing who is going first.

THE COURT: Well, I'll permit you — I'll permit this witness to testify on that basis.

MR. TURNER: Very well.

DANIEL BERNSTEIN, Plaintiff's Witness, Sworn.

THE AUDIO OPERATOR: Please state your name for the record and spell your last name?

THE WITNESS: Daniel P. Bernstein, B-e-r-n-s-t-e-i-n.

DIRECT EXAMINATION

[22] BY MR. TURNER:

Q. Mr. Bernstein, you're a lawyer in Philadelphia, I take it? A. That's correct.

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Q. And where do you make your offices, sir? A. 1429 Walnut Street, Suite 1400.

Q. Were you retained by Mr. Rashid in or about the summer of 1990? A. Yes, I was.

Q. And for what purpose were you retained, please? A. To work out an agreement concerning Mr. Rashid's lease of the 30th floor of the Lewis Tower Building in Philadelphia.

Q. Sir, directing your attention to September of 1990, was an agreement reached between Mr. Rashid and the Lewis Tower Building? A. Yes, there was.

Q. And could you just ever so briefly, please, describe,for the Court the nature of this agreement? A. Basically a schedule of repayment was worked out with the Lewis Tower Building to make up the past due rents and to carry on current rents, rental payments. As part of the agreement, a judgment by agreement for possession of the property was entered into. Also, as long as payments were kept current, there was a written agreement to the effect that the writ of possession would not be acted on, an alias [23] writ would not be issued and there would be no actual attempt by Lewis Tower Building to take possession of the 30th floor.

Q. Now, as of November 1990, Mr. Bernstein, did it come to your attention as to whether or not Mr. Rashid was current or not current in connection with his payments on this workout agreement of September? A. Yes.

Q. And what was the situation there, just very briefly, please? A. At the end of October Mr. Rashid was not up to

his payments pursuant to the agreement.

MR. SUDDATH: Your Honor, just so the record — excuse me, Mr. Turner — just so the record is clear, I don't mean to beat a dead horse, but the Government's position for the record is this entire line of questioning is not relevant to the issue before the Court.

THE COURT: I understand. Your objection is noted.

MR. TURNER: May I have one moment with opposing counsel?

(Discussion off the record.)

BY MR. TURNER:

Q. Mr. Bernstein, I place before you an exhibit which I have marked as Exhibit D-1. Can you describe that document for the Court, please? A. Yes, this document purports to be a memorandum from the [24] Lewis Tower Building to all building security to the effect that absolutely nothing is allowed to be removed from the above-mentioned suite, referring to Suite 3000, Amin Rashid.

Q. And that is as of November 14, 1990? A. That is the date on the memorandum, yes.

Q. I'm sorry? A. That is the date, yes.

Q. And you got this from — excuse me. Have you ever seen it before today, this memorandum? A. Yes, I have.

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Q. And when did you first see it, please? A. I was first made aware of it in November of 1990.

Q. And it was brought to your attention by whom, please? A. By Mr. Rashid.

Q. Now, I'm going to direct your attention to a month later, that being December 14, 1990, what if anything occurred on that day in connection with the Rashid Lewis Tower Building situation? A. That would be on Friday. That afternoon I received a call from Shelley Lange, a paralegal at the Law Offices of Robert Guzzardi which at that time was representing the Lewis Tower Building to the effect that the last check submitted by Mr. Rashid pursuant to the agreement had been dishonored and that a lockout would be scheduled for approximately noon on the following Monday, December 17th.

[25] Q. Did you try to reach Mr. Rashid with this information? A. I did several times that afternoon.

Q. And on the weekend also? A. Yes, at home over the weekend.

Q. And may we understand that those attempts, at least through Sunday, were unsuccessful? A. That's correct.

Q. Did you reach Mr. Rashid on Monday with this news? A. We spoke approximately 9:30 Monday morning.

Q. And that would be December 17th? A. December 17th, yes.

Q. And in fact was the lockout accomplished on that date? A. Yes.

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Q. Now, I'm going to direct your attention, if I could, please, to late December of 1990. Were you still representing Mr. Rashid in connection with his relationship with the Lewis Tower Building? A. Yes, I was.

Q. And did you and Mr. Rashid have a meeting as a result of which you had a telephone conversation with Mr. Guzzardi? A. That is correct.

Q. Could you please describe for the Court your late December 1990 telephone conversation with Mr. Guzzardi, please? A. Yes. I was instructed to contact Mr. Guzzardi and make [26] an offer of $10,000 towards the amount due Lewis Tower Building in exchange for allowing Mr. Rashid to enter the 30th floor of the Lewis Tower Building to remove several files.

Q. And did Mr. Guzzardi make a response to you? A. Mr. Guzzardi categorically rejected the suggestion.

Q. And what did Mr. Guzzardi say in rejecting this in terms of what would or would not be acceptable to the Lewis Tower Building?

MR. SUDDATH: Objection; hearsay.

THE COURT: Overruled.

THE WITNESS: Mr. Guzzardi indicated that the full amount due pursuant to the agreement would have to be paid before Mr. Rashid would be allowed on the premises.

BY MR. TURNER:

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Q. Now, on that same day — well, was Mr. Rashid with you when you had this telephone discussion with Mr. Guzzardi? A. Yes, he was.

Q. And immediately after that what did Mr. Rashid do, please? A. Mr. Rashid, using my telephone, attempted to reach Mr. Jeff Seligsohn of Binswanger Management Company.

Q. And you heard this? A. Yes, I did.

Q. Okay. And was he successful — well, tell the Court what [27] you were told about that attempt, please? A. Mr. Rashid picked up the telephone and dialed Binswangei, asked for Mr. Seligsohn and apparently was told that he was unavailable.

Q. And did he — A. And Mr. Rashid left his telephone number with a request for Mr. Seligsohn to call him back and that was the end of it.

Q. Directing your attention to the period January and February 1991, what action if any did you take in connection with Mr. Rashid's attempts to regain his property at the Lewis Tower Building? A. I definitely recall at least one and I believe there were two brief telephone conversations again with Shelley Lange of Mr. Guzzardi's office basically to the effect as to what the status was vis-a-vis the 30th floor, whether it had been relet, whether any material had been removed. I was told by Ms. Lange that — that the status quo remained the same; it was a very brief telephone call.

Q. And directing your attention now if I might, please, to March of 1991, what if anything occurred in connection with your continued representation of Mr. Rashid? A. Commencing in

early March I was instructed to commence settlement negotiations with Lewis Tower Building through Mr. Guzzardi's office to the effect of gaining both entrance to [28] the 30th floor and to renew the lease, so to speak, of the 30th floor so it would be used for Mr. Rashid's business purposes.

Q. And did you have back and forth discussions with Mr. Guzzardi on the point? A. Yes, with both Mr. Guzzardi and Ms. Lange.

Q. And at some point in time in March or early April were business terms agreed on in principle? A. Yes. In early April there was an agreement reached both as to the amount which would be paid in full satisfaction of the judgments that had been incurred on behalf of Lewis Tower, as to a half payment of rent for storage charges during the period during which Mr. Rashid was not allowed on site and also renegotiating into a new lease, the terms of that new lease. An agree —

Q. Did the — I'm sorry. A. I was going to say agreement in principle was reached on all those issues by early April.

Q. As of that time did you have knowledge, either personally or by something somebody may have said to you that there was any problem with the Rashid property having been taken from the 30th floor? A. I had no information concerning that.

Q. I direct your attention then to April 29, 1991. Could you tell the Court what happened on that day? [29] A. Yes, I was out of the country on vacation. The second half of April before I went on vacation we had set a meeting for the afternoon of April 29th with myself, Mr. Rashid, Mr. Guzzardi and Ms. Lange, at which time the agreement in principle would be finalized among

the parties. Such a meeting was held at approximately 3:30 on the afternoon of April 29th, attended by myself, Mr. Rashid, Ms. Lange, Mr. Guzzardi; it was held in Mr. Guzzardi's law offices on Walnut Street.

Q. And what if anything happened at the end of that meeting? A. An agreement in principle was reached to both satisfy the prior debt to Lewis Tower Building as well as resetting the terms of the new lease going forward.

Q. And that was the same agreement that had been reached before you went — before you were traveling, is that correct? A. That's correct, this was just to finalize the agreement.

Q. Mr. Bernstein, I place before you that which I have marked as D-2. A. Yes.

Q. Can you describe those documents for the Court? A. This is a document appears to be a photocopy of two cashier's checks drawn on Mellon Bank, both issued to Robert R. Guzzardi P.C. The first check in the amount of $25,517 represents both satisfaction of the outstanding judgments as [30] well as the agreed upon, quote, "storage rent," unquote, running up to the end of April. The second check on the page in the amount of $9300 represented a new security deposit of three months rent to be applied vis-a-vis the new lease which was to be entered into.

Q. Now, were these checks in fact given to Mr. Guzzardi that day? A. They were not.

Q. And what happened at the conclusion of that meeting, if you would, please? A. At the conclusion of the meeting an

agreement was reached that Mr. Guzzardi's office would prepare a formal settlement agreement which would be presented to myself and Mr. Rashid the following morning. At that time the execution of the settlement agreement the checks would be turned over to Mr. Guzzardi.

Q. And did Mr. Guzzardi on behalf of Binswanger or Tranel Corporation permit Mr. Rashid then the privilege of inspecting the premises? A. Yes. Before execution of the agreement Mr. Rashid wished to inspect the premises. Mr. Guzzardi thereupon contacted either Lewis Tower Building or Binswanger Management and informed us that he had made arrangements for both Mr. Rashid and myself to walk around the corner and allow us access to the 30th floor of the Lewis Tower Building.

[31] Q. And you gained such access, I take it? A. We did, yes, that afternoon.

Q. And did you find the files and records missing? A. Yes, I did.

Q. Did you have any further discussion thereafter with Mr. Guzzardi concerning a settlement of the dispute between Mr. Rashid and the Lewis Tower Building? A. Yes, actually from the 30th floor of the Lewis Tower Building, the phones were still operational, Mr. Rashid and I placed an inumediate call to Mr. Guzzardi informing him we had found various filing cabinets that were left open that had been drilled, there were certain computer terminals which were no longer there. We informed Mr. Guzzardi that we were prepared to go ahead and sign the settlement agreement provided that there was an exception to the release, mutual release which was to be part of the agreement, allowing Mr. Rashid to assert any claims arising out of the disappearance

of the material from the 30th floor.

Q. Did Mr. Guzzardi indicate to you whether or not he knew the items you were complaining of were in fact missing as of when he was sitting with you on the 29th? A. Mr. Guzzardi said he had no idea what happened.

Q. And was that agreement then ultimately entered into? A. No, I spoke with Mr. Guzzardi the following morning, who informed me that his client would not agree to such a carve-[32] out from the release and as a result there was no point in going further.

Q. Now, have you had occasion in connection with your work as a lawyer to know Mr. Guzzardi in the context of other cases as well as this case? A. Yes, I have.

MR. SUDDATH: Objection.

THE COURT: What does this have to do with anything? You are way past the time when the files were seized and I don't see that it has any point, so I'll sustain the objection.

BY MR. TURNER:

Q. Do you know whether or not Mr. Guzzardi knew — let me withdraw that, your Honor.

To your knowledge was any writ of execution, any levy or any attachment issued by the Court of Common Pleas of Philadelphia County — A. Not to my —

Q. — in connection with the Rashid personal property located

on the 30th floor of the Lewis Tower Building? A. Not to my knowledge.

Q. To your knowledge was any distraint or notice of distraint following the statute issued or effected in this case, Mr. Bernstein?

MR. SUDDATH: Objection.

[33] THE COURT: Overruled.

THE WITNESS: Not to my knowledge at that time. Subsequently I was informed that there was a notice placed on the property.

BY MR. TURNER:

Q. And may we understand it was placed on the property in a place which was not —

MR. SUDDATH: Objection.

MR. TURNER: Withdrawn. I'll get that through another witness, your Honor. I have no further questions for Mr. Bernstein.

CROSS-EXAMINATION

BY MR. SUDDATH:

Q. Mr. Bernstein, when Mr. Rashid was evicted on December 17th, 1990, he owed approximately $20,000, did he not? A. I

believe the judgment was for 15,000 plus.

Q. The judgment you're referring to, what judgment is that? A. The judgment by agreement that had been entered into in, I believe, late August of 1990.

Q. Let me hand you what's been marked for identification Government Exhibit G-4. That is in fact a alias writ of possession, correct? A. That's correct.

Q. Okay. And with that alias writ of possession am I correct that the landlord was empowered to direct the [34] Philadelphia Sheriff to lock Mr. Rashid out of the premises? A. That's correct.

Q. And I believe you said you met with Mr. Rashid at 9:30 on December 17th? A. No, I did not, I said I —

Q. Or you spoke with him, is that correct? A. — spoke with him, yes.

Q. And this lockout occurred approximately 4:00 o'clock on December 17th, is that correct? A. I am not sure of the date; I was not present at the time.

Q. There is marked on the back of Government Exhibit G-4 the date 12/17 at 4:00 o'clock, correct? A. It does say 4:00. It doesn't say a.m., p.m.; I can't testify as to what that — those numerals mean.

MR. TURNER: We'll stipulate it was approximately 4:00

o'clock, your Honor.

BY MR. SUDDATH:

Q. Since the — since Mr. Rashid was locked out of the premises did you, on his behalf, ever file an injunction to block the lockout? A. No, we did not.

Q. Okay. Did you ever pursue any legal course of action on his behalf to interfere or for him to gain access back? A. No, a determination was made not to proceed by that route.

[35] Q. And during the course of your discussions with Mr. Rashid you testified that there were negotiations for him to re-let the premises, correct? A. That's correct.

Q. Okay. During this time do you recall making a request on his behalf for the property that was in the 30th floor to be returned to Mr. Rashid? A. Could you — I don't understand the context of the question.

Q. Did you ever ask for the property that was located in the 30th floor of the Lewis Tower Building to be returned to Mr. Rashid after he was evicted and locked out on December 17th? A. One of the purposes of the negotiations was to allow him access to his property located on the 30th floor there.

Q. So am I correct that you never requested for the property to be returned to Mr. Rashid? A. Well —

MR. TURNER: Objection to the extent that that purports

to restate Mr. Bernstein's testimony, it's inaccurate.

THE COURT: The objection is overruled; he hasn't answered the question.

THE WITNESS: Other than what I outlined previously in my testimony there was no additional request, that's correct.

[36] BY MR. SUDDATH:

Q. Okay, so you will agree with me that you never asked on Mr. Rashid's behalf for the property to be returned to Mr. Rashid, yes or no?

MR. TURNER: Objection. That's inconsistent with Mr. Bernstein's direct testimony.

THE COURT: The objection is sustained, but not for the reason you're suggesting. It's been asked and answered, as far as I'm concerned.

BY MR. SUDDATH:

Q. Did you ever hear Mr. Rashid make a request to any Binswanger or Tranel representative for his property to be returned to him? A. No, I don't recall ever hearing any specific conversation on any matter between Mr. Rashid and representatives of Binswanger.

MR. SUDDATH: Your Honor, I have no further questions.

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THE COURT: All right.

MR. TURNER: I have no redirect examination, your Honor.

THE COURT: All right, you may step down.

THE WITNESS: Thank you, your Honor.

(Witness excused.)

MR. TURNER: I don't plan to call Mr. Bernstein [37] again. I know he's indicated an interest in remaining in the courtroom with the Court's permission.

THE COURT: What?

MR. TURNER: Mr. Bernstein — oh, never mind. I had forgotten this was a sealed proceeding, your Honor. My apologies. I was dealing only with the sequestration issue.

THE COURT: Okay, you may call your next witness.

CHRISTOPHER D'ERASMO, Plaintiff's Witness, Sworn.

THE AUDIO OPERATOR: State your name and spell your last name, please?

THE WITNESS: Okay, my name is Christopher D'Erasmo, D'-E-r-a-s-m-o.

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DIRECT EXAMINATION

BY MR. TURNER:

Q. Good afternoon, Mr. D'Erasmo. You appear here pursuant to subpoena, is that correct. A. Sir?

Q. You appear here pursuant to a subpoena which was served on you, is that correct? A. Yes, sir.

Q. Mr. D'Erasmo, as of the period which would include December 1990 into March 1991, were you in charge of the building operations of the Lewis Tower Building on behalf of Binswanger? A. Yes, sir, I was.

[38] Q. Let me place before you that which has previously been marked as Exhibit D-1. Would you take just a moment and look at it, please?

(Pause.)

A. Yes, sir.

Q. Mr. D'Erasmo, first, is that your signature which appears next to the typing of your name on the second line of this memorandum? A. Yes, sir.

Q. Did you issue this memorandum at the instruction of Binswanger, is that correct? A. Yes, sir.

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Q. And is it, so far as you're aware, the usual practice of Binswanger that when a tenant gets behind on rent, they want to make sure that none of the personal property is taken out of the building by the tenant under that circumstance where there is a lateness or a delinquency in the rent? A. Not unless they go through the building manager.

Q. And so far as you are — so far as you are aware, Mr. D'Erasmo, was the policy with respect to Amin Rashid, Suite 3000, enforced as that policy is expressed in Exhibit D-1? A. Yes, sir.

Q. Mr. D'Erasmo, were you present in December of — on December 17, 1990, when the sheriff came to lock out Mr. Rashid from the premises? [39] A. Yes, sir.

Q. And tell me, please, how long did the sheriff or the sheriff's representative give Mr. Rashid to clear out of the premises once the sheriff or his representative arrived? A. It was — I have to think, there was twice when the sheriff came.

Q. I'm speaking of the second time, Mr. D'Erasmo. A. The second time? Yes, sir, he had walked in and told Mr. Rashid that he would have to vacate the premises and Mr. Rashid said he knew about it, he was waiting for him to come and he asked for a few minutes so that he could alert his staff that they had to leave the premises, which Mr. Rashid did, and then the sheriff said go take five or ten minutes and we'll wait here for you or take five minutes and we'll wait for you.

Q. And in fact is that about how long Mr. Rashid was given to clear out of the premises, about five minutes? A. Five or ten minutes, yes, sir.

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Q. All right. I'm going to shift your attention now, if I could, please, to a later point in time. Mr. D'Erasmo, I place before you that which I have caused to be marked as Exhibit D-3. Have you seen this before? A. Yes, I believe this is the thing, the paper that I posted on the lobby of Mr. Rashid's suite by the elevator.

Q. Now, when Mr. Rashid was locked out of the 30th floor of [40] the Lewis Tower Building, first, so that we may understand it, he had the entire 30th floor, is that correct? A. That's correct.

Q. And there was no separate entry door to the Suite 3000 aside from the elevator doors, is that correct? A. That's right.

Q. After Mr. Rashid was locked out did Binswanger turn off on an electric or electronic basis the elevators to the 30th floor except and unless somebody used a special key to gain access to the 30th floor, is that correct? A. That's correct.

Q. So if somebody just sort of walked into the building, walked onto the elevators and tried to push the button which said 30 and go to the 30th floor, they couldn't do that, could they? A. No, sir.

Q. Now, did you post this notice, this notice of distraint, where without that special key access to the 30th floor no one could see it?

MR. SUDDATH: Objection.

THE COURT: Well, what does this have to do with anything?

MR. TURNER: This purports to be a notice of distraint, your Honor. Notice has to be given in a particular way under

the statute. It was given in a way [41] where Mr. Rashid could not have seen it as a matter of physical impossibility because of the configuration of the building.

THE COURT: All right, the objection is sustained. I don't think this is relevant to the inquiry, objection sustained.

MR. TURNER: Very well. If the Court will bear with me just one moment.

(Pause.)

BY MR. TURNER:

Q. I direct your attention, Mr. D'Erasmo, to March of 1991. Were you present in the Rashid suite in the Lewis Tower Building when the Postal Inspector Hazelton and an FBI Agent Williams were up there and caused the locks on the file cabinets to be drilled? A. I was — I was there for a few moments, yes, sir.

Q. And did you overhear any discussion between Inspector Hazelton or Ms. Williams with respect to what they were going to do with this large volume of records? A. Not between themselves, no, but I talked to Hazelton, Mrs. Hazelton prior to the FBI coming up on the floor.

Q. And did she say with respect to this quantity of records that the Government would be taking them all to a warehouse and sort through them at that time? A. Right.

[42] MR. TURNER: I have nothing further.

THE COURT: All right. Anything?

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MR. SUDDATH: Very brief cross, your Honor.

CROSS-EXAMINATION

BY MR. SUDDATH:

Q. Mr. D'Erasmo, during the period of time that you were on the 30th floor on March 4, 1990, did Ms. Hazelton or Ms. Williams ever threaten you? A. Oh, no, sir.

Q. Did they ever tell you not to tell Mr. Rashid that they were there? A. No, sir.

Q. Did they ever tell you not to return any documents to Mr. Rashid? A. No, sir.

Q. Did they ever tell you not to tell Mr. Rashid of the existence of the subpoena? A. No, sir.

Q. Did they ever attempt to intimidate you or coerce you in any way? A. No, sir.

Q. Could you describe for the Court, please, in your own words what their approach to you was? A. Well, I only had conversation with Mrs. Hazelton. When I, I believe you were — I think they were up on the floor [43] when I had gotten there and we knew they were coming, I was notified that they would be there. And I went up and introduced myself and she showed me her credentials and those two fellows that were there with her and we talked about that they were going to check and have a vehicle come and take what records they felt they needed. And then the FBI agent, I don't know her name, she came up on the floor and I said "Well, I have to get down to the Packard

Building," cause I was running both buildings. I said "I have to go to the Packard Building" and I left and that was about the extent of our conversation. And —

Q. Prior to March 4th, 1991, had you been requested by any representative of the Government to provide any of the documents that were on the 30th floor to the Government? A. No, sir, no, sir.

Q. Have you ever been requested by any representative of the Government to provide copies of any documents? A. No, sir.

Q. Have you been requested by any representative of the Government to provide access to these documents prior to March 4th, 1991? A. No, sir.

Q. And in fact did you ever see Ms. Hazelton or Ms. Williams on the 30th floor of the Lewis Tower Building prior to March 4th, 1991? [44] A. No, sir.

MR. SUDDATH: I have no further questions, your Honor.

MR. TURNER: Just one or two, very briefly, on redirect, your Honor.

REDIRECT EXAMINATION

BY MR. TURNER:

Q. When you took Inspector Hazelton for the first time up to the 30th floor, did you have to open the private offices around the perimeter of the 30th floor for Inspector Hazelton? A. I — I don't remember whether they were up on the floor or I took

them up on the floor. I can't recall that. I know, I think they were — I believe they were already up on the floor when I arrived. I think my lobby attendant might have let them up there, but I'm not clear on that. But as far as the — all the offices are open, they were going to open the one office for Mr. Rashid's office and so I had a screwdriver and I said just push it in and I pushed the screwdriver in the door, which did open.

Q. So the door was locked and you opened it with a screwdriver? A. Right.

MR. TURNER: Nothing further.

MR. SUDDATH: Nothing further, your Honor.

[45] THE COURT: Thank you, sir, you are excused.

(Witness excused.)

MR. TURNER: May I have one moment?

THE COURT: Yes.

(Pause.)

MR. TURNER: Your Honor, my only other witness today will be Mr. Rashid. With the Court's permission, I have a couple of other witnesses I brought here pursuant to subpoena. Might I have just one moment to excuse them?

THE COURT: You may excuse them. We'll take a five-minute break here.

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MR. TURNER: Oh, okay, thank you, your Honor.

(Court in recess; 2:35 to 2:45 p.m.)

THE COURT: Please proceed. Mr. Turner, you have anymore witnesses?

MR. TURNER: I have one more witness, your Honor.

THE COURT: All right, you may call your witness.

MR. TURNER: Petitioner calls Mr. Rashid.

THE COURT: All right.

AMIN RASHID, Plaintiff's Witness, Sworn.

THE AUDIO OPERATOR: State your name and spell your last name for the record.

THE WITNESS: My name is Amin A. Rashid, the last name is spelled R-a-s-h-i-d.

MR. TURNER: Your Honor, before I begin the [46] questioning of Mr. Rashid, I would move that the Court enter a ruling that this testimony is in the nature of testimony at a suppression hearing, not in the nature of United States against Simmons, in that this is a Rule 41 motion hearing before criminal charges have formally been filed.

THE COURT: Does the United States wish to respond to that?

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MR. SUDDATH: Yes, your Honor, I would. I'm not sure I understand the purpose for Mr. Turner's request. If Mr. Rashid under oath gives statements which would subject him to a possible penalty of perjury, then the Government should not be limited to a subsequent prosecution of that. I trust that's not Mr. Turner's —

MR. TURNER: That's not an issue, of course, your Honor.

THE COURT: What is the basis of your motion?

MR. TURNER: Your Honor, this is a hearing scheduled at our request so that on Mr. Rashid's behalf I may assert his rights arising under the 4th Amendment. Because no criminal charges have been filed, it is not precisely a suppression motion, but the constitutional issues and the constitutional rights are identical as if it were. Under *United States v. Simmons*, decided many years ago, certain procedural events occur consequent upon a person in Mr. Rashid's —

[47] THE COURT: So what are you asking me to do in this regard?

MR. TURNER: I'm asking that you enter a ruling, that you make a ruling from the bench that Mr. Rashid's testimony is as if it were given in a suppression hearing, which would make it inadmissible in the Government's case in chief at a subsequent trial of Mr. Rashid on criminal charges because the rights being asserted here are identical as if it were a suppression hearing, your Honor.

THE COURT: All right. I will make that ruling, however,

subject to the matter of perjury which the Government's attorney brought up.

MR. TURNER: Of course, your Honor.

THE COURT: All right.

MR. TURNER: Thank you very much. And I will indicate to the Court that my questioning of Mr. Rashid will be to very precisely limited issues.

THE COURT: Well, that's what I thought it would be. This is a fairly limited issue.

MR. TURNER: It is, your Honor.

THE COURT: Okay.

MR. TURNER: It is.

DIRECT EXAMINATION

BY MR. TURNER:

Q. First, Mr. Rashid, with respect to the property which [48] remained on the 30th floor of the Lewis Tower Building after the lockout of December 17th, 1990, did you intend to abandon that property? A. No.

Q. You have heard Mr. Bernstein's testimony concerning a late December phone call you allegedly placed to Mr. Seligsohn, albeit unsuccessfully; did that in fact occur? A. Yes.

Q. And did Mr. Seligsohn ever get back to you? A. No.

MR. TURNER: May I approach, your Honor?

(Pause.)

BY MR. TURNER:

Q. Mr. Rashid, I place before you photocopies of photographs which have been labeled as Exhibits D-4 and D-5. Sir, do those depict file cabinets which while located on the 30th floor of the Lewis Tower Building in your suite were drilled? A. Yes.

Q. Were you the owner of those file cabinets? A. Yes.

Q. Did you — withdraw that. I direct your attention to this morning commencing at approximately 8:00 a.m., Mr. Rashid, did you have occasion to inspect certain records at the Office of the Postal Inspection Service at 30th and Market Streets, Philadelphia? [49] A. Yes.

Q. And did you conduct an inspection of records taken from the Lewis Tower Building, 30th floor? A. Yes.

Q. And in that inspection did you come across records which were personal records and not at all involved with Amin A. Rashid and Associates which were in possession of the Government as a result of their seizure on March 1991? A. Yes.

Q. Mr. Rashid, you have seen a copy of a document filed with this Court entitled Rashid's Reply to Government's Supplemental Response to Motion for Return of Seized Property

which I prepared on your behalf? A. Yes.

Q. And that document —

MR. TURNER: May I approach, your Honor?

THE COURT: Yes. BY MR. TURNER:

Q. That document contains on Pages 2 and 3, does it not, 12 numbered paragraphs? A. That is correct.

Q. Were the documents described in those 12 numbered paragraphs of Rashid's Reply to Government's Supplemental Response to Motion for Return of Seized Property your personal property? [50] A. Yes.

Q. And were they seized by the United States? A. Yes.

Q. And in addition to that were other records seized by the United States? A. Other personal records?

Q. Yes, I'm sorry, other personal records? A. Yes, other personal records were seized.

Q. Including litigation files? A. That is correct, yes.

Q. Including files where you are a party and represented by counsel? A. Yes.

Q. May we understand that you did or you did not ever intend to abandon those litigation files? A. I did not intend to abandon any files, litigation or other.

Q. And did you intend to waive or give up the attorney-client or the attorney-work product privilege in connection with any of those litigation files? A. No, I did not.

MR. TURNER: I have no further questions, your Honor.

CROSS-EXAMINATION

BY MR. SUDDATH:

[51] Q. Mr. Rashid, do you know — let me — D-4 and D-5, these are the photographs. Do you know when these photographs were taken? A. Yes, they were taken approximately a week to ten days ago.

Q. Do you know where they were taken? A. Yes.

Q. Where? A. They were taken at the 30th floor of the Binswanger — of the Lewis Tower Building.

Q. That's the property that you formerly leased, correct? A. The property that was leased, formerly leased, correct.

Q. And prior to that time did you remove any other property that you claimed was yours from that premises? A. Prior to that time, yes, I had gone —

Q. Prior to the time these photographs were taken? A. Yes.

Q. Okay, but you chose not to take these files which you now claim are yours? A. I chose not to take them because of the damage done.

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Q. Mr. Rashid, have you ever been known by any other name?

MR. TURNER: Objection, relevance.

THE COURT: Overruled.

MR. TURNER: Objection, beyond the scope of direct examination.

[52] THE COURT: Overruled.

THE WITNESS: Yes.

BY MR. SUDDATH:

Q. And what name is that? A. Lawrence D. Wilson, Larry Dolby Wilson.

Q. Did you formally change your name? A. Yes.

Q. Okay. And where was that? A. Philadelphia, in Common Pleas Court.

Q. When?

MR. TURNER: Objection, your Honor. This is well beyond the scope of direct examination and not —

THE COURT: Well, the reason I permitted it is of course your witness testified as to what his name is and therefore that permits cross-examination on that issue.

THE WITNESS: It was, to my best recollection it was November of 19— November or May of 1954, in my best recollection it was in the year of 1954.

MR. SUDDATH:

Q. Now, is it your testimony here today that some of the documents that remained on the 30th floor of the Lewis Tower Building were property of Amin A. Rashid and Associates? A. Is it my testimony?

Q. If you would agree with me that some of the property that remained on the 30th floor was property of Amin A. Rashid and [53] Associates? A. That remained on the 30th floor after the, following the eviction?

Q. Correct. A. Yes.

Q. Is Amin A. Rashid and Associates, Inc., a Delaware corporation? A. Yes.

Q. And was this incorporated in September 21st, 1989? A. In or about that period; I don't recall that exact date.

Q. Is that your company? A. Yes.

Q. And what position do you hold in that company? A. President.

Q. Yes? A. President.

Q. President. Let me hand you a document that's been marked for identification as Government's Exhibit 1. Could you

identify that? A. It appears to be a letter written to — addressed to Thomas Suddath and it was written by an Alan Turner.

Q. The date of this letter is May 3rd, 1991, correct? A. That is correct.

Q. And at that point you had retained Mr. Turner to represent you in this matter, correct? [54] A. That is correct.

Q. Okay. Am I correct, Mr. Rashid, that the second paragraph of this letter states "Would you please provide me at the earliest possible time a copy of the United States Grand Jury subpoena directed to Binswanger pursuant to which the FBI or other law enforcement authorities secured the file of Amin A. Rashid and Associates, Inc., from the Lewis Tower Building," is that correct? A. It's correct that it states that.

Q. Mr. Rashid, when did you rent 1424 Chestnut Street? A. Can you repeat the question?

Q. When did you rent 1424 Chestnut Street? A. I became a tenant there I think the day after being evicted from — from Lewis Tower Building, as I best recall.

Q. And am I correct that on that same date you filed a change of address label from the Lewis Tower Building to 1424 Chestnut Street? A. Yes, in and about that period.

Q. Mr. Rashid, you said that you didn't intend to abandon certain property. Did you ever make a request to, you yourself make any request to any Binswanger representatives for return of the property that was located on the 30th floor of the Lewis Tower Building following your eviction? A. I could never —

no, I could not get in touch with Mr. Seligsohn who was the only one, of my knowledge, that could [55] authorize that.

Q. So am I correct that you did not make such a request? A. Correct.

Q. Now, you testified about certain litigation files? A. Is that a question?

Q. No, no, it's not a question, no. Are you a lawyer, Mr. Rashid? A. No.

Q. Have you ever stated that you attended and graduated from law school?

MR. SUDDATH: Objection. Beyond the scope of direct examination and not relevant.

THE COURT: Sustained.

BY MR. SUDDATH:

Q. The litigation files that exist in, that were located in your office space, were you — were you involved, were you acting as an attorney with regard to any of those alleged litigation files?

MR. TURNER: Objection to the form of the question, it's unclear, do you mean as his own attorney or as attorney for someone else?

BY MR. SUDDATH:

Q. As your own attorney? A. Yes, as my own attorney,

there were some pro se actions, the bulk of them were pro se actions.

[56] Q. And with regard to those same alleged litigation files, were you acting as an attorney on behalf of any other individuals? A. Not as an attorney, no.

Q. How would you describe your capacity with regard to those other alleged litigation files?

MR. TURNER: Objection, is this relevant? Objection to relevancy, beyond the scope of direct.

THE COURT: What is your response?

MR. SUDDATH: Your Honor, my response is this is part of the Government's case involves allegations of mail fraud and the Government believes that these files contained further evidence of mail fraud in that Mr. Rashid had been acting as an attorney for other individuals and therefore if he is claiming an attorney-client privilege, the Government is entitled to go into this to determine whether or not an attorney-client privilege exists.

THE COURT: Are you claiming attorney-client privilege?

MR. SUDDATH: Or if it did, whether there's a crime fraud exception that would apply.

THE COURT: Are you claiming attorney-client privilege?

MR. TURNER: I am, your Honor, but if I may explain, please. There are two sets of files here at issue. One set [57] of files involved files where Mr. Rashid is a party to the action and

is represented by counsel as to which an attorney-client privilege is claimed.

Another set of files pertain generally to the subject of litigation not involving Mr. Rashid either as a party or as an attorney and therefore no attorney-client privilege is claimed.

THE COURT: Wait a minute, is he, he's not an attorney?

MR. TURNER: He is not an attorney, your Honor.

THE COURT: And the attorney-client privilege you're claiming has to do with what? You've got me — you really lost me on that.

MR. TURNER: Let me do it again, if I might, your Honor.

Mr. Rashid is a party to certain litigation, certain lawsuits.

THE COURT: Right. Right.

MR. TURNER: In certain of those lawsuits he is undertaking to represent himself.

THE COURT: Okay.

MR. TURNER: In certain of those lawsuits he is represented by regular counsel. In that last category of cases, suits where he is a party, where he is represented by counsel, he claims the attorney-client and the attorney-work [58] product privilege.

Now, aside from those cases where Mr. Rashid is a party, there are instances where he is in possession on a personal basis

of certain files pertaining to litigation as to which he is not a party and of course he is not counsel, and so no attorney-client privilege is claimed as to those files.

THE COURT: All right. I understand your point. Now, what's the question, Mr. Suddath?

MR. SUDDATH: Your Honor, the question was, I believe it was to ask Mr. Rashid to explain in what capacity he was representing the individuals that are alleged to be litigation files.

THE COURT: All right, I think that's a proper question. The litigation files you are seeking to have returned, aren't you?

MR. TURNER: I'm seeking all the files to be returned, your Honor.

THE COURT: All the files, then I'll let that question stand. The objection is overruled.

MR. TURNER: Do you have the question?

THE WITNESS: I believe I understand that the question is what was my capacity in terms of litigation files involving other parties, parties where I'm not a party to the action, is that the question?

BY MR. SUDDATH:

Q. That's correct. How would you describe your role with regard to those other files?

MR. TURNER: Objection to relevancy, your Honor. What

we're litigating here is the propriety of the seizure.

THE COURT: I have already overruled your objection.

MR. TURNER: Very well.

THE WITNESS: Well, I would describe my position in files where I am not a — where I am not a defendant or plaintiff as just being one of assisting on a purely personal basis an action that may have been brought by someone else, in the way of assisting them with research. But there were no fees paid for the services that were provided.

MR. SUDDATH: Your Honor, may I have just one moment?

THE COURT: Go ahead.

(Pause.)

MR. SUDDATH: Your Honor, I have no further questions.

THE COURT: All right, anything else?

REDIRECT EXAMINATION

BY MR. TURNER:

Q. Were the records which were seized by the United States, Mr. Rashid, records of either you personally or of your proprietorship of Amin A. Rashid and Associates?

[60] MR. SUDDATH: Objection.

THE COURT: Overruled.

THE WITNESS: The records that were seized by United States were records of Amin A. Rashid and Associates and records of Amin A. Rashid personally, as well.

MR. TURNER: Nothing further. Thank you, your Honor.

THE COURT: Any recross on that question?

MR. SUDDATH: No, your Honor.

THE COURT: All right, you may step down.

THE WITNESS: Thank you, your Honor.

(Witness excused.)

MR. SUDDATH: Your Honor, the defense moves Exhibits D-1 through D-5 marked for identification. Additionally, your Honor, both counsel have placed before you a stipulation I have prepared but we have both signed and which contains Exhibits either 1 or 2 or A and B, I'm not sure how we labeled them, being the testimony on direct or cross-examination of Mr. Seligsohn were he available to be here as a witness today. As the Court knows, he is on vacation and we were not anxious to inconvenience him.

THE COURT: Okay. Right. Okay, those exhibits —

MR. SUDDATH: With that, Mr. Rashid rests, your Honor.

THE COURT: What is this matter you say you gave me,

[61] a stipulation, is that — oh, this must be it here. Okay, yes, I have it.

MR. SUDDATH: Yes, your Honor, the Government also moves for the admission of Government's Exhibits 1, 2, 3 and 4.

THE COURT: Okay.

MR. SUDDATH: 1, 2 and 4, your Honor, there was no G-3, I don't believe, your Honor.

THE COURT: There is no G-3, all right.

MR. SUDDATH: 1 through 4, your Honor.

THE COURT: I think counsel have both briefed the issues involved here. I will, however, give you each a limited amount of time to orally argue your position. We'll begin with the petitioner here, do you wish to make argument?

MR. TURNER: Your Honor, there is outstanding Rashid's motion to intervene. The Government has consented to that, has filed no response, no order has been entered. I call that to your attention as a housekeeping matter.

THE COURT: Okay.

MR. TURNER: A proposed form of order is before the Court in connection with that.

The petitioner approaches this case today in court, your Honor, as we did in the initial filing. This procedure by which the United States obtained pieces of paper and computer records

is a warrantless search. It may not [62] properly be considered pursuant to a subpoena, no — well, to take the next step then under established and I think unquestioned decisional authority, the Government has the burden of establishing the applicability of an exception to the 4th Amendment search warrant exception. There has been no evidence offered which would suggest such an exception and I understand that none is advanced.

The Government takes the position instead that Rashid's 4th Amendment claim is overcome by virtue of the issuance of a subpoena, and so I suggest to the Court that the issue is before the Court for resolution, the issue must be resolved as to whether the procedure followed was a subpoena procedure or a seizure procedure which I believe if it were a seizure, it must be held unlawful.

The 4th Amendment provides, and I read, "The right of the people"—

THE COURT: I am well aware of the 4th. I don't mean to shortcut you, but I know that real well, so that's —

MR. TURNER: Let me do it another way, Judge, because what I say is important.

THE COURT: You are suggesting here that if this is a 4th Amendment procedure that there was no probable cause or anything established as to why you could have the seizure of the property.

MR. TURNER: That's right. And I think the [63] abandonment issue, quite frankly, in light of the evidence of record, I think the Government has the burden of proving that.

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THE COURT: You are suggesting a subpoena from the Grand Jury cannot be executed in this manner.

MR. TURNER: I'm sorry?

THE COURT: You are further suggesting that a subpoena from a Grand Jury cannot be executed in the manner in which this was executed?

MR. TURNER: That's exactly right, and I think *Barr* is perhaps the most instructive case in terms of discussing how you decide whether a subpoena is really a subpoena or an executive branch warrant, because I think everyone can say with certainty that while a Grand Jury subpoena is a judicial or quasi-judicial creature, it is issued in blank to an attorney for the Government, its issuance and service, its description of documents is not in any way controlled by the judiciary unless and until a subpoenaed witness comes to court on a motion to quash, modify or limit under Rule 17 or otherwise.

Of course, there was no notice given to Mr. Rashid. The agents were personally in touch with Mr. Rashid between the time they learned the records were in the Lewis Tower Building and they caused service of this subpoena, that is right in the middle of the month of February of this year, [64] Judge.

And, of course, while notice according to the *Barr* court is not absolutely controlling, it is one of those factors to be considered. They didn't use a warrant, they used a drill.

I suggested that the procedure followed in this case was in all respects a search. Judge, the 4th Amendment, and I'm not going to read you the whole thing because I understand you are

modestly familiar with it, based on your comments, but it does talk about the right of people to be secure in their papers and effects, which I was getting to earlier. These are Rashid's papers and effects.

THE COURT: There is no question that if this was a strict 4th Amendment issue that these items would be protected. But I don't know if it is exactly a 4th Amendment issue here and the Government's position is that it is a subpoena issued pursuant to a Grand Jury proceeding and your rights thereto are limited somewhat. And of course it's true you didn't get any notice of this and it's also true that you don't have to have notice of it, so I would like to —

MR. TURNER: Don't I have to have notice?

THE COURT: Let me have the Government, ask them for their word and then, since it's your petition, I'm going to give you the last word.

MR. TURNER: Very well.

[65] THE COURT: All right, Mr. Suddath.

MR. SUDDATH: Your Honor, it's the Government's position that the issue before the Court is very simple and it's controlled by Supreme Court authority. Simply put, whether the documents at issue which were obtained pursuant to the Grand Jury subpoena which were in possession of a third party were properly obtained where the Government was not involved in having those documents come into possession of the third party in any way, shape or form.

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The testimony that the Court has heard today clearly establishes that the Government obtained the documents pursuant to a Grand Jury subpoena, that prior to the issuance of the Grand Jury subpoena, the Government had not had access to the documents, had not looked at the documents, had not requested access to the documents, that it only obtained access to the documents once the Grand Jury subpoena had been issued to a party who was in possession of the documents.

THE COURT: Party in possession of the documents was notified of the Grand Jury subpoena?

MR. SUDDATH: That's correct, your Honor.

Since Mr. Rashid may have a claim against the third party who provided the — provided us with access to the documents, however, that issue is not before the Court.

The case law is clear that the Grand Jury subpoena may be issued to a third party who is in possession of those [66] documents; that was done in this case.

THE COURT: Now, what about the rights of an intervenor here and his position which we've allowed him to intervene and in the sense of this hearing have something to do with the breadth and the scope of the subpoena which he is now maybe also objecting to? How do you address that issue? Are there some things here that — I think the Government has been indicating a willingness to give up some things or return certain matters, at least by means of copying those things, isn't that correct?

MR. SUDDATH: That's correct, your Honor. The Goverrment has at all times told Mr. Rashid, through his counsel,

that we would provide him access to the documents and in fact we did that today.

The Government is in the process of reviewing the documents to present them as part of the Grand Jury investigation. Now, should it be determined that these documents may be returned to Mr. Rashid, we will do so at the earliest occasion. However, and if Mr. Rashid comes in and makes a showing that he needs these documents we have said you can come in and take these documents.

What we did have a controversy about whether we would copy the documents and we have been copying certain documents and then we said no, until this matter gets resolved, but we have said you can provide access, we will [67] give you access to these documents.

So the Government's position is Mr. Rashid's interests have not been aggrieved here, to the extent they have been aggrieved, there are remedies available and avenues available which the Government is willing to compromise on.

THE COURT: All right, Mr. Turner? I think I understand the point, it's pretty much what's set forth in your brief, Mr. Suddath.

MR. TURNER: I'm sorry, your Honor?

THE COURT: I'm asking you now to respond.

MR. TURNER: Judge, first with respect to access to records and copies —

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THE COURT: Well, let's get to the issue of the subpoena. They subpoenaed a third party in whose possession these documents were. Now, what's wrong with that?

MR. TURNER: Kevin Donahue is my landlord as general partner of a limited partnership. May he get my law files out of my office — may the Government get my law files?

THE COURT: I'm not asking you about your law partner and you, I'm asking you about this situation where arguably the goods were in possession of the landlord pursuant to a writ of possession because your client hadn't paid his rent and therefore a subpoena was served upon them as the party in possession of these things. Now, what is constitutionally wrong about that?

[68] MR. TURNER: What's constitutionally wrong is a subpoena is a direction to someone to produce described records and is discussed in Rule 17 of the Federal Criminal Rules, particularly describing what is to be produced.

THE COURT: Right.

MR. TURNER: In this case it is a subpoena of a blunderbuss nature, that is any and all files, records and computer records, so that the subpoena suffers from incredible over-breadth. It's no wonder by the way that Binswanger didn't object to that, they could care less. But they —

THE COURT: Well, of course, that's right, but that doesn't have anything to do with the fairness of the procedure if they're the party in possession and they don't object to it and a subpoena is issued, then your rights come, it seems to me, as an intervenor, which you did indeed intervene.

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MR. TURNER: I intervened as soon as I could.

THE COURT: You could object to the breadth of the subpoena on that basis, but then you have to show me what the specific things are, it seems to me, that you're objecting to.

MR. TURNER: I object to everything.

THE COURT: Well —

MR. TURNER: In my view, Judge, I don't know where [69] their investigation is going. They choose not to tell me, except for bits and pieces. Am I to be required to structure their subpoena? The answer is no. Against a subpoena saying produce everything, it seems to me the only fair way to do it is to require the Government to go back and say all right, well, I'm going to subpoena Categories A, B, C and D. Don't expect me to agree on behalf of Mr. Rashid to give up any records that the law does not require that I give up. That frankly is not my function. That's why this is a meaningful motion and not an exercise in futility because of the 5th Amendment privilege which attaches. This was clearly a search.

The parking garage is in lawful possession of my car which might contain papers. May a subpoena be directed to the custodian of the garage? That the garage has no more lawful ownership of those papers, Judge, than Binswanger had of the Rashid papers under the law of Pennsylvania. They didn't follow the distraint procedure, which is likely unconstitutional, they never — the sheriff never levied, there was never a sale, there was never a notice of distraint, no procedure was followed. There is no self-help remedy in Pennsylvania, it is a statutory creature. And even

if the statute is constitutional, as the Bankruptcy Court says, it must be followed.

In this case it was not followed, it was honored [70] only in the breach, so that Binswanger's possession was not in any way, shape or form any more lawful than you can say the garage owner's possession of the files in the trunk of my car is lawful, perhaps less so, because they distrained them or restrained them against a claim of right by the true owner who through counsel tried to get them back and was told forget it, pay up.

THE COURT: I think you are characterizing it somewhat different than what I see it, but nevertheless, that isn't necessarily the fundamental issue involved here, so, I'm not going to argue with you about the constitutionality of the constraint laws, the distraint laws of Pennsylvania, because I don't think that's an issue here necessarily.

MR. TURNER: I don't think you have to decide it.

THE COURT: But I understand what the point you're making is and I'll have to review some things and determine the appropriate relief here.

MR. TURNER: Judge, I would ask the Court in connection with its review of this matter and the issuance of a decision to make a specific finding on the issue of abandonment because there is no evidence here of abandonment, as defined.

THE COURT: Well, there might or might not be. All right, I will hand down a decision shortly in this case.

MR. TURNER: Judge, thank you for seeing us this [71] afternoon.

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THE COURT: Court is adjourned.

(Court adjourned at 3:20 p.m.)

* * *

APPENDIX F — COPY OF PETITIONER'S LEASE TO THE PROPERTY SUBJECT TO THE SEIZURE

LEASE

LEWIS TOWER Building

BINSWANGER MANAGEMENT CORP., AGENT

TO

AMIN A. RASHID & ASSOCIATES, P.C.

Room No. Suite 3000
(entire 30th floor)

THIS AGREEMENT, Made this *1st* day of *August* one thousand nine hundred and *eighty nine* (1989), between *BINSWANGER MANAGEMENT CORP.*, Agent hereinafter called Lessor, and *AMIN A. RASHID & ASSOCIATES, P.C.* hereinafter called Lessee witnesseth:

That Lessor lets unto Lessee the office designated as *Suite 3000* on the *entire 30th floor of Lewis Tower Building, 225 S. 15th Street* in the City of Philadelphia, Pennsylvania for the term of *five (5) years* to begin on the First day of *October* one thousand nine hundred and *eighty-nine* (1989), and to end on the *thirtieth* day of *September* at 12 o'clock noon, one thousand nine hundred and ninety-four (1994) at the rent of *FIFTY THREE THOUSAND FOUR HUNDRED FORTY-FIVE AND* Dollars (*$53,445.00*) per annum, payable without any previous demand therefor, in equal monthly payments of *FOUR THOUSAND FOUR HUNDRED FIFTY-THREE* and 75/100 Dollars (*$4,453.75*) in advance on the First day of each month, and the further rent of all other sums which may become due by Lessee under the covenants, terms and conditions of this lease, at the office of the Lessor in

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Philadelphia *Suite 600-1635 Market, Phila., Pa 19108* during business hours, or at such other place as said Lessor may in writing from time to time direct. Rent to begin from the *First* day of *October*, 1989 and the first installment to be paid at the time of signing this lease. The above letting is subject to the following covenants, terms and conditions:

1. Lessee agrees that Lessee will not assign this lease nor sublet the said premises or any part thereof, and will use and occupy the same as *AND FOR LAW AND CONSULTING OFFICES* and for no other purpose without the written consent of Lessor first had and obtained, which approval Lessor agrees not to unreasonably withhold it being agreed that any levy or sale or execution or other legal process against Lessee, or any assignment or bankruptcy proceedings or the filing of petition under any of the provisions of the Federal Bankruptcy Act or any State insolvency law by or against Lessee or appointment of a receiver for or insolvency of Lessee, may at the option of Lessor be deemed and taken to be an asssignment within the meaning of this lease: nor shall Lessee manufacture any commodity, nor prepare nor dispense foods or beverages therein, nor do or permit anything to be done in said demised premises or in any part of said building, nor bring or keep anything therein which will in any way increase the rate of fire insurance now in force or hereafter be placed, over that for such a building used exclusively for office purposes, or avoid or suspend policies of fire insurance now in force or hereafter be placed, on said building, or on property kept therein, or which will obstruct or interfere with the rights of other tenants, or in any other way injure or annoy them, or which will conflict with the laws or regulations of police, fire department or Board of Fire Underwriters' regulations, or with any of the rules and regulations of the Board of Health, or any other bureau or any constituted authority

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whatever including Lessor's liability insurance carrier, nor will the Lessee allow said premises or any part thereof to be occupied by any other person than Lessee or Lessee's employees without the written consent of Lessor endorsed hereon.

2.***

3. This lease is to become null and void and all money paid on account thereof is to be refunded by Lessor unless the lease is approved Lessor's principal within *fifteen* (*15*) days from the date hereof. Provided, however, that if Lessee shall have taken possession of herein demised premises, the provisions herein provided for recovering possession by Lessor by an amicable action and confession of judgment ejectments shall remain in force and Lessor shall be entitled to receive from Lessee as for use and occupation of said premises the proportionate of the rent herein reserved and other charges payable for the period of time that Lessee shall have been in possession of said premises.

4. Lessee agrees to pay to Lessor, as additional rent hereunder and at the times set forth in this Section 4, the sums set forth in this Section to be paid by lessee, on account of Lessee's pro rata share of the amount by which the building operating costs during each calendar year of term of this lease exceed the building operating costs for *1989* (the "base year").

For purposes of this Section 4, it is agreed that the demised premises contains *approx. 2545 rentable* square feet that the rentable area of the building is *approx. 145,898* square feet and that Lessee's pro rata share shall be *1.744%* "Building operating costs shall include the cost of all utilities, fuel, building supplies, janitorial services, maintenance and repairs; elevator service, wages

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of employees who work customarily in and about the building and whose duties are connected with its operating, maintenance or repair (including social security taxes, unemployment insurance costs, costs of providing disability benefits, and cost of pension, hospitalization or retirement plan). Cost of hazard, rent, liability and other insurance, taxes, water and sewer rents, professional and consulting fees, management fees, charges or fees for government permits, and other expenses, dissimiliar or similiar reasonably incurred in the operating and maintenance of the building and the land on which it stands and related land and facilities (which building, land and facilities are hereinafter called the Property).

Lessor, in good faith, shall conclusively determine the amount of such annual building operating costs and once each year, beginning with the calendar year *1991* until and including the first calendar year commencing after the expiration of this lease, shall send Lessee an itemized statement ("escalation statement") setting forth the building operating costs for the preceding calendar year, the amount (the "prior year's escalation"), if any, by which the building operating costs for such preceding calendar year exceeded the building operating costs for the base year, and Lessee's pro rata share of the prior year's escalation. Lessee shall have the right to inspect the cost records at the office of Lessor. If the term of this lease commences after the first day of the calendar year preceding *1991* or expires prior to the last day of the last calendar year beginning within the term. Lessee's pro rata share for the first or, as the case may be, last calendar year shall be proportionately reduced to reflect the portion of the calendar year within the term.

Within 15 days after Lessee's receipt of the escalation statement (the "first statement") to be sent during the calendar year *1991*). Lessee shall pay to Lessor the amount of its pro rata

share of the prior year's escalation as set forth therein. In addition to such amount, Lessee shall also pay to Lessor (i) within 15 days after receipt of the first statement, an amount equal to 1/12 of its pro rata share of such prior year's excalation (as annualized) multiplied by the number of months of this lease in the then current calendar year up to and including the month in which the first statement is received, and (ii) on the first day of each month after the month in which the first statement is received until and including the month in which the next year's escalation statement is received or the sooner expiration of this lease, 1/12 of its pro rata share of such prior year's escalation (as annualized).

Thereafter, within 15 days after Lessee's receipt of each subsequent escalation statement after the first statement, Lessee shall pay to Lessor (i) the amount, if any, by which Lessee's pro rata share of the prior year's escalation set forth in such subsequent escalation statement exceeds the payments made by Lessee under this Section 4 with respect to the months of the preceding calendar year, plus (ii) the amount, if any by which (x) 1/12 of Lessee's pro rata share of such prior year's escalation multiplied by the number of months of this lease in the then current calendar year up to and including the month in which such escalation statement is received exceeds (y) the aggregate of the monthly payments theretofore made by Lessee under this Section 4 with respect to each month of the then current calendar year. In addition, on the first day of each month after the month in which Lessee receives each escalation statement after the first statement, until and including the month in which the next escalation statement is received by Lessee or the sooner expiration of this lease, Lessee shall pay to Lessor 1/12 of its pro rata share of the prior year's escalation. If the escalation statement sent to Lessee during any year shall disclose that its pro rata share of the prior year's escalation is less than thepayments made by Lessee under this

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Section 4 with respect to the months of the preceding calendar year, such excess (plus any excess of each monthly payment theretofore made under this Section 4 for the then current year over 1/12 of the Lessee's pro rata share of the prior year's escalation) shall be credited against the monthly payments next falling due under this Section 4 and after the expiration of this lease, and, on determination of the final year's escalation, any remaining balance of such excess shall be refunded to Lessee.

Lessor may make a reasonable estimate of any sums to become due under this Section 4 and make a written demand therefor at any time during the last two (2) months of a term which is about to expire. Upon such demand, Lessee shall pay the amount of said estimate subject to later adjustment upwards or downwards when all information necessary for a final calculation shall be available.

Notwithstanding that the cost of any item should be excluded from building operating costs because, under standard accounting practice, it should be capitalized, (i) if such item is an alteration, device or installation required by law, the cost thereof shall be amortized over such period as is reasonably determined by Lessor's principal and the amortization applicable to each year shall be included in building operating costs for such year, and (ii) if such item is provided subsequent to the base year is designed to result in savings in energy or other building operating costs, then, as Lessor's principal may elect, either annual amortization shall be included in building operating costs as aforesaid or a reduction which Lessor's principal reasonably determines to be appropriate for such savings shall be made from the corresponding item of building operating costs for the base year for the purpose of calculating Lessee's proportionate share of increased building operating costs.

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As used herein, the term "taxes" shall mean all real estate and other taxes, and all assessments, charges, levies and other governmental impositions, general or special, ordinary or extraordinary, foreseen or unforeseen, levied, assessed or imposed upon, or arising in connection with, the Property or any part thereof, or the use, occupancy, receipts, rents or leases thereof or of any part thereof, excepting, however, any tax which is by law required to be paid by a tenant (and Lessee hereby agrees to timely pay any such tax required to be paid by Lessee), and excepting any income tax not levied or imposed in whole or in part in substitution for, or in lieu of, any other tax which would otherwise be within "taxes" as defined herein.

5. Lessee shall, without any demand therefor and without setoff, pay the rents, and as well all other sums which may become due by Lessee under this lease, all at the times, at the places and in the manner herein provided. All such other sums, and any sums which may become due by reason of any breach of this lease by Lessee, shall be payable as rent for all purposes whether or not they would otherwise be considered rent. If any payment, or any part therof, to be paid made by Lessee to Lessor pursuant to the terms of this lease shall become overdue for a period in excess of 10 days, a "late charge" of five cents for each dollar so overdue may be charged by Lessor, and shall be paid by Lessee, for the purpose of defraying the expense incident to handling such delinquent payment, and Lessee shall also be obligated to pay Lessor interest on the delinquent amount from the date when the payment was due at the rate per annum which from time to time is 2% above the prime rate of Citibank N.A., or in lieu of either or both such late charge and interest, such lesser amount or rate (if any), as represents the maximum amount or rate which Lessor lawfully may charge in respect of Lessee for such delinquency. Nothing herein shall be construed as waiving any rights of Lessor

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arising out of any Lessee default by reason of Lessor's assessing or accepting any such late charge or interest: the right to collect the late charge and interest as provided herein is separate and apart from any rights and remedies of Lessor in the event of default. Without limiting the generality of the foregoing, if Lessee shall be in default in the performance of any of its obligations hereunder, Lessor may (but shall not be obligated to do so), in addition to any other rights it may have in law or equity, cure such default on behalf of Lessee, and Lessee shall reimburse Lessor upon demand for any sums paid or costs incurred by Lessor in curing such default, including reasonable attorneys' fees and other legal expenses and shall also pay to Lessor interest computed from the date or dates of Lessor's expenditures at the rate applicable above in this Section.

6. It is expressly understood and agreed by and between the parties hereto that this lease and rider attached hereto which are identified as Sections *26-33* inclusive and form a part hereof, set forth all of the agreements, conditions, and understandings between Lessor and Lessee. The execution by all parties hereto of the Lease shall represent a full and total execution, including all of the covenants and conditions contained on the riders attached hereto and there shall be no need to execute this contract other than where required on the lease itself.

7. Lessee shall during the term and all continuances thereof, keep, and at the expiration thereof peaceab'y surrender possession of, said premises in as good order and condition as the same now are, reasonable wear and tear and damage by fire or other casuality not occurring through Lessee's negligence excepted, and will at the expiration of said term, or any continuation thereof, deliver the keys at the office of said Lessor. Lessee shall not make any alterations, improvements or additions to the demised premises

without the consent of Lessor first had in writing. All alterations, improvements or additions shall remain upon the premises at the expiration or sooner determination of this lease and become the property of Lessor, unless Lessor shall, prior to the determination of this lease have given fifteen (15) days written notice to Lessee to remove the same, in which event Lessee shall remove such alterations, improvements and additions and restore the premises to the same good order and condition in which they now are. Should Lessee fail so to do. Lessor may do so, collecting the cost and expense thereof from Lessee as additional rent. "Additions" within the meaning of this clause shall include, without being restricted to any floor covering installed by Lessee or especially for Lessee: Lessee shall be responsible for any cost of removal and repair of the underlying surfaces.

8. The rules and regulations in regard to the said building, and the tenants occupying offices therein, printed within this lease, and such reasonable alterations, additions or modifications thereof as may from time to time be made by Lessor, shall be deemed a part of this agreement, with the same effect as though written herein, and Lessee covenants that said rules and regulations shall be faithfully observed by Lessee. Lessee's employees, and all persons visiting the leased premises or claiming under Lessee; the right being hereby expressly reserved by Lessor to add to, alter or rescind, from time to time, such rules and regulations, which changes in rules and regulations shall take effect immediately after notice thereof in writing shall have been served by leaving the same on the demised premises. Lessor shall not be responsible for any violation of or disregard of any of the said rules and regulations or any rules and regulations hereafter adopted, by any other tenant, occupant or person in the said building of which the demised premises are a part and nothing herein shall impose any obligation on Lessor to enforce said rules and regulations

or any of them against any such other tenant, occupant or person, but the same are meant to be rules and regulations to be abided by and complied with by Lessee hereunder.

9. If, during the term of this lease, the building is so injured by fire or other casualty not occurring through the negligence of Lessor or those claiming under Lessee, or their employees respectively, that the demised premises are rendered wholly unfit for occupancy and said demised premises or the building cannot be repaired within ninety days from the happening of such injury, then this lease shall cease and determine from the case of such injury. In such case Lessee shall pay the rent apportioned to the time of the injury and shall immediately surrender the leased premises to Lessor, who may enter upon and repossess the same. If such injury can be repaired within ninety days thereafter, Lessor may enter and repair, and this lease shall not be affected, except that the rent shall be apportioned and suspended while such repairs are being made, if Lessor enters into and occupies demised premises. If the said building shall be so slightly injured by fire or other casualty as aforesaid as not to be rendered unfit for occupancy, Lessor agrees that the same shall be repaired with reasonable promptitude, in which case the rent accrued or accruing shall not be apportioned or suspended.

10. Lessee will pay the said specified rent, and any other charges payable as rent, at the times and in the manner above provided, and all damages, costs and charges in this lease provided for, and in case of non-payment of said rent, damages, costs and charges, if any, or in case the leased premises shall be deserted or vacated, or Lessee shall in Lessor's opinion manifest an intention or attempt to desert or vacate the said premises. Lessor may enter the same either by force or otherwise, without being liable to any prosecution or action therefor, and may distrain

not only for the specific rent above mentioned, but also for all damages, costs and any other charges payable as rent in this lease mentioned and provided for, with the same force and effect as if the same were a distress for rent in arrears, and also may relet the same premises as agent of Lessee for any unexpired portion of the term, and receive the rent therefor. If Lessee shall, at any time during the continuance of this Lease, remove, attempt to remove, or manifest in the judgment of Lessor an intention to remove the goods and chattels out of or off from said premises without having paid and satisfied the said Lessor in full for all rent which shall become due during the term of this lease, or any continuation thereof, or if said Lessee becomes embarrassed or makes an assignment for the benefit of creditors, or if a receiver of Lessee is applied for or appointed, or if there be filed a petition under any of the provisions of any federal or state bankruptcy or insolvency law by or against the Lessee, or if Lessee is levied upon or sold out by any sale under process of law, or if Lessee shall fail to pay any rent or other sum due hereunder when due, or if Lessee or those claiming under Lessee shall fail to keep or comply with any of the covenants, terms or conditions of this lease, then in any such case, the whole rent or any part thereof for the whole term of this lease, or any continuation thereof, or any part thereof, shall be taken at Lessor's option to be due and payable forthwith, and the said Lessor may proceed to distrain for, enter judgment for, claim or otherwise demand and collect the whole or any part thereof in the same manner as if, by the conditions of this lease, the rent for the whole term, or any continuation thereof, or any part thereof, were payable in advance, any law, usage or custom to the contrary notwithstanding. Lessee also agrees that all property on the said premises shall be liable to distress for rent, and for all damages, costs and any other charges payable as rent, and for all costs of distress, watchman's wages and constable's or officer's commissions of 5% and in case any goods

shall have been removed from the leased premises. Lessor may follow, take and return said goods to the leased premises, or distrain on and sell the same wherever found. Lessee hereby waiving the benefit of all laws made, or to be made, exempting property from levy and sale, either on distress for said rent, damages, costs and any other charges payable as rent, or on a judgment for said rent, damages, costs and other charges payable as rent, or for breach of any other of the conditions herein contained.Lessee expressly covenants that at no time during the term of this lease or any renewal or extension thereof, will Lessee, without the express written consent of Lessor, bring or permit to be brought upon the demised premises, any tangible personalty which by reason of a security interest therein held by any person other than Lessee would be exempt from distress for rent under Pennsylvania law: any violation of this covenant will automatically permit Lessor, at Lessor's option, to terminate this lease, accelerate the due date of any unpaid rent for the balance of the term or exercise any other remedy herein provided for failure to pay rent or breach of any other covenant hereof. Lessor is hereby given a security interest under the Uniform Commercial Code in all property at any time on the demised premises, as security for the payment of rent and the performance of all other covenants agreed to be performed by Lessee hereunder, and shall have all of the rights of the holder of a security interest, in addition to any other rights or remedies herein provided for.

11. Lessor will keep in operation in said building during ordinary business hours (8 A.M. to 6 P.M., Monday through Friday 8 A.M. to 1 P.M. Saturdays), except on Legal Holidays, as many of the passenger elevators as in Lessor's judgment are necessary to maintain elevator service. In case of accident, labor strikes, repairs, renewals or improvements to the building or machinery therein, or for other cause deemed sufficient by Lessor,

or those acting for Lessor, the operation of said elevators and other machinery may be changed or suspended.

12. Lessor will keep in operation in said building a heating apparatus for the use of tenants during such periods as the same may be necessary, between the 15th day of October and the 1st day of May of each year and an air-conditioning system during such periods as same may be necessary to be operated throughout the continuance of this lease or any renewals hereof, between the hours of 8 A.M. to 6 P.M., Monday through Friday, 8 A.M. to 1 P.M., Saturdays, Legal Holidays excepted, and will cause said demised premises to be cleaned and cared for by the building cleaning force and will also furnish a reasonable amount of electricity, as Lessor may determine, for lighting the said premises during business hours, reserving the right, however, in case Lessee, in the judgment of Lessor, uses electricity in an extravagant or unreasonable manner of requiring Lessee to put in meters and as aforesaid, nor for heat, nor for air-conditioning. Lessor shall not be liable for any failure to supply the same not due to gross negligence or willful refusal on the part of the Lessor. Lessor, at the inception of the Lease, will furnish a light bulb or bulbs or flourescent tube or tubes, as the case may be for each lighting fixture then installed on the premises and will, during the term of this Lease or any renewal or extension thereof, replace the same from time to time as required for reasonable use. The type and wattage of said bulbs or tubes shall be determined solely by Lessor. Lessor, however shall have no obligation to cause said premises to be cleaned or otherwise cared for on any day when the premises shall be used by the Lessee between the hours of 6 P.M. and 11 P.M. The Lessor's agreement to furnish electricity for lighting does not include electricity for reproduction machinery, computers, or other equipment except electric typewriters and desk-type adding machines, nor any equipment requiring voltage greater

than that supplied by the building's standard receptacle circuits. Where reasonably available, such service will be furnished upon Lessee's tending all costs of installation, including wiring and separate metering and agreeing in writing to pay the cost of current as additional rent. Lessor reserves the right to make reasonable additional charges, payable on demand, as additional rent, for services furnished at request of Lessee on days or at times other than those above defined. As to heat, air conditioning, cleaning service, electricity and elevator service, and any other services, Lessor shall not be responsible or liable in any way for any failure, interruption or inadequacy in the quantity or quality of the same where caused by war, civil commotion, governmental restrictions, prohibitions or other regulations, strikes, labor disturbances, inability to obtain adequate supplies or materials, casualties, repairs, replacements, elevator conversion or causes beyond Lessor's reasonable control whether similar or dissimilar to the foregoing. It is understood that Lessor shall have no obligation to make any repairs except within a reasonable time after written notice to Lessor by Lessee respecting such repairs.

13. Lessee agrees that neither Lessor nor Lessor's principal shall be held responsible for, and they are each hereby expressly relieved from, any and all liability by reason of any injury, loss (including without limitation, loss of life and damage to business), or damage to any person or property in or about the demised premises or the Property, whether the same be due to breakage, leakage, water flow, steam gas, use, misuse, or abuse of elevators or defects therein, defective construction or condition anywhere in the building or on the Property, or any other cause whatsoever, whether the loss, injury or damage be to the person or property of Lessee or any other person or entity, and whether or not due to any oversight, neglect or negligence of Lessor or Lessor's principal occurring before or after the execution of this lease.

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Without limitation of the foregoing, Lessee further agrees that neither Lessor nor Lessor's principal shall be liable in any claim for damages, by reason of inconvenience or interruption to business arising from the making of additions, alterations or repairs to said building or Property, or any part thereof, or to the machinery, fixtures or appurtenances therein, nor shall the making of any such addition, alteration or repair affect the rents and other sums payable hereunder.

14. The terms and conditions of this lease shall not be modified or changed in any way except by written notice given by Lessor as aforesaid, or by writing endorsed hereon signed by Lessor. Provided, however, that nothing shall interfere with changes in Rules and Regulations being made as provided for in the eighth paragraph of this lease. If there be more than one Lessee or Assignee, any notice given by or any one thereof shall have the same force and effect as if given by or to all. Any notice given by Lessor under the terms of this lease may be served by leaving the same on the demised premises. No notice given by Lessee or any person claiming under Lessee shall be withdrawn without the written consent of Lessor. If Lessee fails to surrender possession of the demised premises at the expiration of any current term (time to be of the essence) after having given the notice required hereunder, Lessor may, at the option of Lessor, treat such notice as withdrawn by Lessee with the written consent of Lessor. All notices required to be given by Lessee to Lessor must be given by registered mail and as against Lessor the only admissible evidence that notice has been given by Lessee shall be a registered return receipt signed by Lessor or its agent.

15. It is further agreed that if the said specified rent, additional rent as herein provided, costs or any other charges payable as rent shall at any time be in arrear and unpaid, or if

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said Lessee or those claiming under Lessee, shall fail to keep or comply with any other of the covenants, terms or conditions of this lease, this lease may, at the option of the Lessor, be forthwith terminated and become absolutely void without any right on the part of Lessee or those claiming under Lessee to reinstate the same by payment or other performance of the conditions or covenants violated and thereupon any attorney may immediately thereafter as attorney for Lessee, or for those claiming under Lessee, at the request of Lessor, sign an agreement for entering in any competent Court an amicable action and confession of judgment in ejectment as of any term then past or present (without any stay of execution) against Lessee and all persons claiming under Lessee, for the recovery by Lessor of possession of the hereby demised premises, and costs, without any liability on the part of Lessor or the said attorney, for which this shall be a sufficient warrant, and in like manner any such attorney may, as attorney for Lessee or those claiming under Lessee, at the request of Lessor sign an agreement for entering in any competent Court an amicable action and confession of judgment in assumpsit for all rent and other charges due, or treated as if due hereunder or which may at any time become due under the terms of this lease, or any continuation thereof together with interest and costs and attorney's commission and so on from time to time as often as any of said rent or other charges as aforesaid shall fall or become due or be in arrears or treated as if in arrears under the terms hereof, without any liability on the part of the said Lessor or of the said attorney, for which this shall be a sufficient warrant, and upon the confession of such judgment or judgments respectively, if Lessor so desires, a writ of possession may issue forthwith without any prior writ or proceeding whatsoever, and a writ of execution or any other appropriate writ on said judgment for rent and other charges, and so on from time to time as often as any breach of the terms and conditions of this lease shall occur, and Lessee for

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Lessee and those claiming under Lessee hereby releases to Lessor all errors and defects whatsoever in entering such actions or judgments or causing such writs of possession or execution or any other appropriate writ of execution thereon or concerning the same or either thereof, and hereby agrees that a copy of this lease, with any modifications thereof, together with any affidavit of Lessor or any agent of Lessor, averring a breach of the terms and conditions thereof, being filed in said actions, it shall not be necessary to file the original lease as a warrant of attorney, any law or rule of court to the contrary notwithstanding. And Provided and if for any reason, after such amicable action and confession of judgment in ejectment has been commenced; the same shall be determined and the possession of the premises hereby demised, remain in or be restored to the Lessee, the Lessor shall have the right in any subsequent default or defaults to bring one or more further amicable actions in the manner and form as hereinbefore set forth to recover possession of said premises for such subsequent default. No such determination of this lease, nor taking or recovering possession of the premises, shall deprive Lessor of any other remedy or action against Lessee, or those claiming under Lessee, for possession, or for rent damages, costs or any other charges payable as rent due or to become due, nor shall the bringing of any such action for rent, damages, costs or any other charges payable as rent, or any distress or suit for rent, damages, costs or any other charges payable as rent, prevent Lessor from proceeding to recover possession on a breach of any of the terms or conditions hereof. Lessee on behalf of Lessee and those claiming under Lessee, further expressly waives all right on an appeal from or writ of error or certiorari to any judgment, order or decree that may be given or entered by any Court amicably or otherwise against Lessee or those claiming under Lessee for rent, damages, costs or any other charges payable as rent, possession or otherwise, and agrees that such judgment, order

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or decree shall be final and conclusive upon said Lessee and those claiming under Lessee, without the right to a motion or rule to open judgment, stay of execution of supersedeas. Lessee expressly waives the benefits of all laws now or hereafter in force exempting any goods on the demised premises or elsewhere from distraint, levy or sale in any legal proceedings taken by Lessor to enforce any rights under this lease. Lessee waives all right under the Act of Assembly of April 6, 1951, and all supplements or amendments thereto that have been or may hereafter be passed, and authorizes for sale of any goods distrained for rent at any time after five days from said distraint without any inventory or appraisement thereof.

16. In executing this lease Binswanger, Management Corp., (herein sometimes called agent "Agent") acts as agent only and shall not in any event be liable to the Lessor's principal or if Lessee's for the fulfillment or non-fulfillment of any of the terms, covenants and conditions of this lease, or for any action taken by Lessor's principal against Lessee or by Lessee against Lessor's principal.

17. Lessee agrees that in the event the demised premises or any part thereof are subject by him or for or on his account, or if Lessee's rights under this lease shall be assigned. Binswanger Management Corp. shall have the exclusive right to act as agent of the Lessee for such subletting or assigning and shall be entitled to its usual commissions for such service.

18. Agent shall retain a counterpart of this lease in its possession during the term and any renewal or renewals thereof, under lien for Agent's services. Agent has a beneficial interest in this lease to the extent of all commissions and other compensation due to Agent by Lessor's principal (and to the extent

of such commissions and other compensation the rents and other sums due hereunder are assigned to Agent), and Lessor's principal is entitled to receive only the net amount due hereunder after the deduction of such commission or other compensation. No grantee, assignee, receiver, trustee, encumbrancer or other person or officer shall adopt or receive the benefits of this lease without paying such commission and other compensation or making provisions for the same. Agent shall have a lien for such commission or other compensation and for the payment of any sums advanced in connection with the Property on this lease and on any funds of Lessor's principal in Agent's hands.

19. The right to enter any judgment against Lessee hereinabove provided for, may be exercised on behalf of any assignee of the Lessor in his, her or their name, and shall also be exercisable as often as there is default on the part of the Lessee, not being exhausted by one or more uses thereof.

20. It is hereby mutually agreed and understood that this lease and the Riders, if any contains all agreements, promises and understandings between Lessor and Lessee and that there are no other agreements, promises or understandings of any kind or nature. It is further agreed that, except as herein otherwise provided, no subsequent alteration, amendment, change or addition to this lease shall be binding upon Lessor or Lessee unless reduced to writing and signed by them.

21. In the event that the premises demised or any part thereof are taken or condemned for a public or quasi-public use, this lease, shall, as to the part so taken, terminate as of the date when Lessee shall be legally compelled to give up possession and shall do so, and rent reserved shall abate proportionately to the square feet of leased space taken or condemned as to the part so taken

or shall cease if the entire premises demised be so taken. In the event of any such taking or condemnation, the Lessee waives all claims as against the Lessor herein and as against the condemning authority or party and it is agreed that Lessee will make no claim by reason of the complete or partial taking of the demised premises, excepting removal or moving expenses or business dislocation damages as defined in the Pennsylvania Eminent Domain Code or any Federal statute or rule containing provisions substantially similar thereto, and it is further agreed that the Lessee shall not be entitled to any notice whatsoever of the partial or complete termination of this lease by reason of the aforesaid. In the event of termination of Lessor's lease of the premises of which demised premises form part (whether by Lessor's Lessor or option exercised by Lessor because of unsafe condition of the building or buildings of which demised premises form part, or because of condemnation of the whole or any portion of the building or buildings or premises under lease to the Lessor), this lease shall cease and terminate upon the same date that Lessor's lease shall terminate irrespective of whether or not any portion of the demised premises are declared unsafe and or are condemned. It is agreed that Lessee will make no claim either against the Lessor herein or any other person or persons or public authorities by reason of the aforesaid and waives all claims for any damages, if any, by reason of such termination of this lease in whole or in part, and agrees that such termination in whole or in part shall take effect without any notice whatsoever to the Lessee.

22. This lease shall be subject and subordinate at all times to the lien of any mortgages and/or rents and/or other encumbrances now or hereafter placed on the land and buildings demised or of which the demised premises form a part without the necessity of any further instrument or act on the part of the Lessee to effectuate such subordination, but the Lessee covenants

and agrees to execute and deliver upon demand such further instrument or instruments evidencing such subordination of this lease to the lien of any such mortgage or mortgages and/or ground rent and/or other encumbrances as shall be desired by any mortgagee or proposed mortgagee or by any person. The Lessee hereby appoints the Lessor the attorney in fact of the Lessee irrevocably, to execute and deliver any such instrument or instruments for and in the name of the Lessee.

23. In the event that the herein demised premises are not ready for Lessee's occupancy at the time herein fixed for the beginning of the term of this lease, because of any alterations or construction now or hereafter being carried on either to the premises demised or to the building of which the said premises form a part, (unless such alterations are being done by Lessee or Lessee's contractor, in which case there shall be no suspension or proration of rental or other sums), or because of the non-completion of the building of which the demised premises form a part, or because Lessor being itself a Lessee of the said premises has not received possession thereof from its Lessor for any reason whatsoever, or because of the failure or refusal of the occupant of the said demised premises who is or may be in possession immediately before the beginning of the term hereof to vacate and surrender up the same, or because of any restrictions, limitations or delays caused by Government regulations or Governmental agencies, this lease and the term hereof shall not be affected thereby, nor shall Lessee be entitled to make any claim for or receive any damages whatsoever from Lessor, and the term hereof shall nevertheless end on the date herein originally fixed; but no rent or other sums herein provided to be paid by Lessee shall become due until the demised premises are ready for Lessee's occupancy, and until that time the rental and other sums shall be suspended and pro rated.

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Lessor agrees to send Lessee notice by mail addressed to Lessee at Lessee's last known post office address, advising Lessee when the said demised premises are or shall be ready for Lessee's occupancy in the event they are not ready at the beginning of the term.

24. The failure of Lessor to insist upon strict, and/or prompt performance of the terms, covenants and conditions of this lease or any of them, and/or the acceptance of such performance thereafter shall not constitute or be construed as a waiver or relinquishment of Lessor's right to enforce the same strictly thereafter according to the tenor hereof in the event of a continuing or subsequent default on the part of Lessee.

25. All rights, remedies and liabilities hereby given to or imposed upon any of the parties hereto shall extend to and be binding upon their respective heirs, executors, administrators and successors, and insofar as this lease and the term or terms hereby created may assignable, to the assignee of said parties.

(ATTACHED to and forming part of lease dated *August 1st,* 1989, by and between BINSWANGER MANAGEMENT CORP., Agent, Lessor and AMIN A. RASHID & ASSOC., Lessee, covering Suite 3000 on the 30th Floor in the Lewis Tower Building, 225 S. 15th Street, Philadelphia, Pennsylvania)

26. Promptly upon the execution of this lease, Lessor agrees at Lessor's sole cost and expense, to perform the following at the commencement of this lease:

To shampoo the existing carpeting.

To wash the windows and venetian blinds

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To dust the ceiling lighting fixtures.

To clean the glass tops on the existing furniture.

Except for the foregoing, Lessee agrees to accept the herein demised premises in its present order, arrangement and condition and there is no obligation on the part of the Lessor to perform any alteration in the demised premises either prior to or during the term of this lease.

27. Lessee has deposited with the Lessor the sum of $13,361.25 to be held by Lessor in an interest bearing bank account as security for the faithful performance and observance by Lessee of the terms, provisions and conditions of this lease. It is agreed that in the event Lessee defaults in respect to any of the terms, provisions and conditions of the lease, including but not limited to the payment of rent and additional rent Lessor may use, apply or retain the whole or any part of the security so deposited to the extent required for the payment of any rent and additional rent or any other sum as to which Lessee is in default and for any sum which Lessor may expend or may be required to expend by reason of Lessee's default in respect of any of the terms, covenants and conditions of the lease including but not limited to any damages or deficiencies accrued before or after summary proceedings or other re-entry by Lessor.

In the event the Lessee shall fully and faithfully comply with all the terms, provisions and conditions of the lease the security, together with interest, shall be returned to Lessee after the date fixed as the expiration of the term of the lease and after delivery of the entire possession of the premises to Lessor.

Binswanger Management Corp., is acting as Agent for Lessor

(and, if named as Lessor herein, as escrowee under the Pennsylvania Real Estate Brokers Licensing Act and the regulations of the Real Estate Commission issued pursuant thereto) only, and shall under no circumstances be liable to Lessee for the return of the security or any interest thereon or for anything else in connection with said lease or leasehold and Lessee's recourse shall be exclusively against the principal of Binswanger Management Corp., Agent and not against it, provided that in the event of any controversy with regard to funds held by said agent in escrow said agent shall pay the same into a court of appropriate jurisdiction, less its expenses and such counsel fees as may be allowed by said court for doing, and interpled the parties to said controversy. In the the event of the sale by the Lessor or Lessor's principal to a bona fide purchaser, Lessor shall have the right to transfer the security or Lessor's rights therein to such purchaser and Lessor shall thereupon be deemed released by Lessee from all liabilities for the return of such security; and Lessee shall look to the new Lessor solely for the return of said security, and it is agreed that the provisions hereof shall apply to every transfer or assignment made of the security or Lessor's rights therein to a new Lessor. Lessee further covenants that it will not assign or encumber or attempt to assign or encumber the monies depositied herein as security and that neither Lessor nor its successors, assigns or agent shall be bound by any such assignment, encumbrance, attempted assignment or attempted encumbrance.

28. Lessee agrees to pay to Lessor, as additional rent hereunder, no later than the last day of each taxable period for which it is due, the Philadelphia Realty Use and Occupancy tax (or any other tax imposed on Lessee which Landlord is authorized to collect) applicable to the demised premises. In the event that Lessee shall fail to do so on any occasion, then, without limitation of any other remedies which may be available to Lessor under

this lease or at law or in equity, Lessee shall be obligated to pay to Lessor any penalties, costs and interest, charges incurred by Lessor or Lessor's principal by reason of failure to pay or remit such tax.

29. Lessee shall carry and keep in force, at its own expense, with respect to the demised premises, a policy or policies of public liability and property damage insurance with an insurance company or companies, and in form reasonably satisfactory to Lessor which shall be in the minimum amount of $1,000,000 combined single limit per occurrence for bodily injury and property damage. Such policy or policies shall include Lessor's interest with Landlord named as an insured, and Lessee shall deliver to Landlord such policy or policies or certificates thereof evidencing such coverage together with an endorsement thereon evidencing payment of premium, or other satisfactory proof thereof. Lessor shall have the right to require Lessee to reasonably increase the amount of coverage under such policy or policies. In the event of the Lessee's failure to comply in any respect herein, the Lessor may cause same to be done to the Lessee's account and the costs thereof, shall be deemed to be additional rent.

During the term hereby demised the Lessor shall insure the building of which the demised premises are a part, and Lessee shall insure the demised premises and its fixtures and contents for the full replacement value under an "ALL RISK" type policy which shall include a waiver by the insurer of all right of subrogation against Lessor or Lessee in connection with any loss or damage thereby insured against. Neither party, nor its agents, employees or guests shall be liable to the other for loss or damage caused by any risk covered by such insurance. Each party shall deliver to the other satisfactory proof evidencing such coverage. If the release by either Lessor or Lessee as herein set forth shall

contravene any law with respect to exculpatory agreements, the liability of the party in question shall be deemed not released but secondary to the other's insurer.

30. The figures agreed to in Section 4 are for the purposes of calculating Lessee's pro rata share of building costs only, and shall not be used in calculating base rentals, the amount of which is conclusively set forth above and agreed to by the parties hereto.

31. In determining Operating Expenses for any year, including the Base Year for Operating Expenses, if less than 95% of the rentable area of the Building shall have been occupied by tenants for more than thirty (30) days during such year, Operating Expenses shall be deemed for such year to be an amount equal to the like expenses, which would normally be expected to be incurred had such occupancy of the Building been 95% throughout such year, as reasonably determined by Landlord.

32. It is understod and agreed that this lease and the term hereof shall expire absolutely on September 30, 1994, without further notice from either party thereto.

33. Lessee hereby acknowledges the existence upon the demised premises of certain office furniture and furnishings, as shown in the inventory, marked Exhibit "A" attached to and forming part of this lease. Lessee is hereby given the privilege of using said furniture and furnishings with the understanding and agreement that Lessee will at all times, at its sole expense, keep and maintain the same in good repair and condition and upon the expiration or any sooner determination of this lease, Lessee shall surrender to Lessor full and complete possession of the said furniture and furnishings in good condition, ordinary wear and tear alone excepted. Lessee agrees, at it sole cost and

expense, to make any replacements of said furniture and/or furnishings which may become necessary due to fire, loss, damage or misuse thereof.

Anything herein elsewhere contained to the contrary notwithstanding in this Section 33, Lessee acknowledges notice of the fact that Lessor makes no warranty hereinto the ownership of the furniture and furnishings under this section and that at anytime during the term hereof, a governmental or quasi governmental authority may claim ownership of said furniture and furnishings and may remove same from the premises and from the building. In the event of such happening Lessor agrees to reduce the minimum annual rental payable hereunder by Lessee to Lessor from the sum of $53,445.00 per annum to the sum of $50,900.00 per annum effective on the date such governmental authority shall remove said furniture and furnishings from the herein premises.

BINSWANGER MANAGEMENT CORP., Agent, Lessor, and AMIN A. ASSOCIATES, LESSEE, covering the 30th Floor in the Lewis Tower Building, 225 S. 15th Street, Philadelphia Pennsylvania)

LEWIS TOWER BUILDING
30TH FLOOR INVENTORY
EXHIBIT "A"

RECEPTIONIST AREA
1. — Light Green/Beige Love Chair
3. — Light Arm Chairs
2. — Brown Magazine Tables
2. — Wall Pictures
1. — Ceiling Fan

Appendix F

SOUTH CUBICLE
1. — Built-in wall desk with 2 drawer file cabinet
1. — Secretary chair
5. — Wall pictures (store on the floor)

NORTH CUBICLE
1. — Built-in Wall desk with 2 drawer file cabinet
1. — Secretary Chair
1. — Wall picture

EAST CENTER CUBICLE
1. — Built-in wall desk with 2 drawer file cabinet
1. — Secretary chair
1. — Wall Picture

OFFICE (BEHIND CENTER CUBICLE) (EAST CENTER)
1. — White Arm Chair
Wall Shelving (Wood)

SOUTHEAST CORNER OFFICE
1. — Wooden Coat Rack
1. — Small Conference Desk
1. — High Back Arm Chair
3. — Arm Chair

MAIN CONFERENCE ROOM (SOUTH SIDE)
1. — Large Conference Table
8. — Chairs
2. — Wall Pictures
1. — Ceiling Fan

NORTHEAST CORNER (SUBSIDIARY TO SITTING AREA)
4. — Arm Chairs
3. — Wall Pictures
1. — Magazine Table

NORTHEAST CORNER OFFICE

1. — Large Smoke Glass Desk
1. — High Back Executive Chair
5. — Wall Pictures
2. — High Back Chairs
1. — Small table
Built-in Shelving and Drawers

MIDDLE OFFICE (NORTH SIDE)

2. — Secretary Desk
2. — Secretary Chairs
1. — Black Pull out File

NORTHWEST CORNER OFFICE

1. — Round Wood Kitchentable with 4 hard plastic chairs
1. — Computer desk with chair
1. — Refrigerator
1. — 2 File drawer cabinet
2. — Black pull out file cabinets

RULES AND REGULATIONS

Referred to in the eighth item of the foregoing lease, and forming a part thereof

1. The sidewalks, halls, passages, elevators and stairways shall not be obstructed by any of the tenants, nor used by them for any other purpose than for ingress and egress to and from their respective offices, nor shall they be used as a waiting or lounging place for tenants employees or those having business with tenants. The halls, passages, elevators, stairways and roofs are not for the use of the general public, and Lessor retains in all cases the right to control and prevent access to any part of said building, or of any adjoining building, of all persons whose presence, in the judgment of Lessor or Lessor's employees, will be prejudicial

Appendix F

to the safety, character, reputation or interest of the building and its Lessees. In case of invasion, mob, not, public excitement, or other commotion. Lessor reserves the right to prevent access to the building during the continuance of the same by closing the doors or otherwise, for the safety of tenants and the protection of property in said building. During other than business hours, access to the building may also be refused, unless the person seeking admission is known by the watchman in charge to have the right to enter demised premises therein or is properly identified, and the production of a key to such demised premises may in addition be required, provided that Lessor shall in no case be liable in damages for the admission or exclusion of any person from said building.

2. The floors, walls, partitions, skylights, windows, doors and transoms that reflect or admit light into passageways, or into any place in said building, shall not be covered or obstructed by any of the tenants. The toilet-rooms, water-closets, sinks, and other water apparatus shall not be used for any purposes other than those for which they were constructed, and no sweeping, rubbish, rags, ashes, chemicals, or refuse from electric batteries or other unsuitable substances, shall be thrown or placed therein. Any damage resulting from such misuse or abuse shall be borne and immediately paid by the tenant by whom or by whose employees it shall have been caused.

3. Nothing shall be placed by tenants or their employees on the outside of the building, or on the windows, window-sills or projections.

4. No sign, advertisement or notice shall be inscribed, painted or affixed on any part of the outside or inside of said building unless of such character, color, size and material, and in such

places, as shall be first designated by Lessor in writing. A sign painter authorized by Lessor will do such work at tenants expense.

5. Each tenant must upon surrendering possession at the termination of the foregoing lease, deliver to Lessor all keys of said demised premises, and of water-closets and toilet-rooms appurtenant thereto, and leave the windows and doors in the demised premises in like conditions as at the date of said lease.

6. Lessor retains in all cases the right to prescribe the method and manners in which any merchandise, furniture, iron safe or heavy or bulky object shall be brought in or taken out of the said building, and the hours at which the same shall be done, and further retains the right to limit and prescribe the weight, size and proper position thereof, and all damage done to the building by the bringing in or taking out thereof, or by reason of the presence thereof in the building, shall be made good and immediately paid by the tenant by, through or under whom the said damage may have been done. No iron safe or other heavy or bulky object shall be brought into the building or removed therefrom, except by experienced safe men, movers or riggers, authorized in writing by the Lessor. Tenants shall notify the Superintendent of the weight or size of the safe, or other such heavy or bulky object, and arrange with him as to time, method and manner for receiving or delivering the same.

7. In order that the leased premises may be kept in a state of cleanliness, each tenant shall during the continuance of the lease, permit Lessor's employees to take care of and clean said leased premises. No tenant shall employ any person or persons other than Lessor's employees for such purpose, it being understood and agreed that Lessor shall be in no wise responsible for any damage done to the furniture or other effects of tenants

Appendix F

or others by any of Lessor's employees, or any other person, or for any loss or theft of property from leased premises, however occurring or for any damage done to any property, however occurring. Tenants will see each day that the windows are closed and the doors securely locked before leaving the building. Tenants desiring window shades or awnings, or desiring to be served with ice or towels, upon application to Lessor, will be given the name of the person, firm or company authorized to furnish the same at tenants' expense, no others to be employed by tenants for such purposes, nor for caring for shades or awnings. Shades and awnings shall be of the material, style, form and color adopted by Lessor for the building, and no tenant shall put up any that do not conform to such standards. Tenants shall have the right to remove such shades and awnings at the expiration of the lease.

8. Lessor shall have the right, in person or by agent, or agents, to enter any premises at reasonable hours in the day or night, to examine the same, or to run telegraph or other electric wires, steam plumbing or other pipes, or (without being under any obligation so to do) to make such repairs, additions and alterations as Lessor shall deem necessary for the safety, improvement, preservation or restoration of the said building, or for the safety or convenience of the present or future occupants thereof, and to suspend the supply of light, heat and water during the making of such repairs, additions and alterations and also to enter and exhibit the said premises to be let, and to put upon them the usual To Let notice, which said notice shall not be removed or obliterated by any tenant during the three months previous to the expiration of the then current term of the demised premises, and any such entering or exhibiting shall not work an eviction of Lessee nor a rescission of this lease.

9. Lessor reserves the right to require that any office shall

not be used by tenants or others for an employment agency, or for securing employees other than those to be employed on the demised premises, or for the payment of salaries or wages to employees or persons who are not actually employed in the building nor for any other purpose except that specified in the application of the tenant.

10. Tenants, their employees, or others, shall not make or commit any improper noises or disturbances of any kind in the building, smoke in the elevators, mark or defile the elevators, water-closets, toilet-rooms, or the walls, windows, doors or any other part of the building nor interfere in any way with other tenants or those having business in the building. Tenants shall be liable for all damages to the building done by their employees.

11. No carpet, rug or other article shall be hung or shaken out of any window, and nothing shall be thrown by the tenants or tenants employees, nor be allowed by them to drop, out of the windows or doors, or down the passages or skylights of the building and no tenants shall sweep or throw or permit to be swept or thrown from the leased premises, any dirt or other substance into any of the corridors or halls, elevators or stairways of said building, or into any of the light-shafts or ventilators thereof, or upon any adjoining building or roof.

12. No animals shall be kept in or about the premises.

13. If the tenants desire to introduce signaling, telegraphic, telephonic or other wires and instruments, Lessor will direct the electricians as to where and how the same are to be placed, and without such direction, no placing, boring or cutting for wires will be permitted. Lessor retains in all cases the right to require the placing and using of such electrical protecting devices to prevent

the transmission of excessive currents of electricity into or through the building, and to require the changing of wires and of their placing and arrangement under ground or otherwise as Lessor may direct, and further to require compliance on the part of all using or seeking access to such wires with such rules as Lessor may establish, relating thereto, and in the event of non-compliance by tenants or by those furnishing service by or using such wires or by others, with the directions requirements or rules, Lessor shall have the right to immediately cut, displace and prevent the use of such wires. Notice requiring such changing of wires and their replacing and rearrangement given by Lessor to any company or individual furnishing service by means of such wires to any tenant, shall be regarded as notice to such tenant and shall take effect immediately. All wires used by tenants must be clearly tagged at the distributing boards and junction-boxes and elsewhere in the building with the number of the office to which said wires lead, and the purpose for which said wires respectively are used, together with the name of the company operating same.

14. A directory in a conspicuous place on the first floor, with the name of tenants, will be provided by Lessor.

15. Tenants shall not keep or use or allow to be used on the demised premises, any articles having an offensive odor, nor any either, naphtha, prosphorous, benzole, gasoline, benzine, petroleum or any product thereof, crude or refined earth or coal oils, flashlight powder, or other explosive kerosene, camphene, burning fluid, or other illuminating material, except gas, electric light or candles.

16. No tenant and no employees of any tenant shall go upon the roofs of said building or any adjoining building without written consent of Lessor or of the agent of Lessor.

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17. Furniture, bulky packages and freight will be received in the building and shall be removed therefrom at hours and days specified by Lessor and the same shall not be taken to or from the demised premises except by elevator and during such hours as established by Lessor.

18. No vanish, stain, paint, linoleum, oil-cloth, rubber, or other air-tight covering shall be laid or put upon the floors, nor shall articles be fastened or holes drilled or nails or screws driven into walls, doors, or partitions, nor shall the walls, doors, or partitions be painted, papered or otherwise covered, or in any way marked or broken, nor shall machinery of any kind be operated on the demised premises, nor shall any tenant use any other method of heating than that provided by Lessor, without the written consent of Lessor.

19. The delivery of towels, ice, water, newspaper, and other supplies to tenants in the building, will be permitted only under the direction, control and supervision of the Lessor.

20. The use of rooms as sleeping apartments is prohibited.

21. All entrance doors leading from the hallways are to be kept closed at all times.

22. For the protection of tenants, the Lessor reserves the right to refuse admittance to the building between the hours of 7:00 P.M. and 8:00 A.M. Monday through Friday, and from 12 Noon Saturday to 8:00 A.M. Monday, to any person not producing both a key to such tenant's office or suite and a pass issued by building management upon the direction of the tenant. Tenants will please instruct the building manager from time to time as to the number of persons to whom they desire passes issued

Appendix F

for this purpose. It will be the responsibility of the tenant to pick up any pass and key whenever the employment of a passholder is discontinued.

23. The above rules and regulations or any rules and regulations are for the exclusive benefit of and enforceable only by Lessor herein and they shall not inure to the benefit of Lessee herein as against other tenants or in favor of other tenants as against Lessee herein; nor does Lessor warrant to enforce them against other tenants.

Appendix F

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals the day of year aforesaid.

Sealed and delivered in the presence of

BINSWANGER MANAGEMENT CORP., Agent

By s/ illegible
AMIN A. RASHID & ASSOC., P.C.
By s/ Amin A. Rashid (Seal)
Attest SHARRON T. SMALLS (Seal)
s/ Sharron T. Smalls

This lease having been examined by the undersigned as principal is approved with all the agreements contained herein.

TRANEL, INC.
BY: s/ illegible

ADDENDUM

It is understood and agreed between the parties that the Lessor is currently engaged in Legal proceedings with respect to evicting the current tenant from the demised premises and that Lessor will advise Lessee of the status of said litigation 30 days prior to Lessee's anticipated occupancy. Further, it is agreed that Lessor will hold Lessee's check in the amount of $13,361.25, which represents the security deposit mentioned in Section 27 above until September 15, 1989, before negotiating it, and then Lessor will only negotiate said check if Lessee may legally be given possession of the demised premises. Further, it is agreed that Lessee's check

in the amount of $4,453.75 shall be immediately negotiated by Lessor as a *good faith deposit* until the litigation mentioned herein has been resolved such that Lessor may give Lessee possession of the demised premises, then said *good faith deposit* shall be deemed the first month's rental in advance.

IN WITNESS WHEREOF, THE SAID PARTIES HAVE HEREUNTO SET THEIR HANDS AND SEALS THE DAY OF YEAR AFORESAID.
SEALED AND DELIVERED
IN THE PRESENCE OF

BINSWANGER MANAGEMENT CORP., Agent

By: s/Illegible (Seal)

AMIN A. RASHID & ASSOCIATES, P.C.

By: s/ Amin A. Rashid (Seal)

Attest: SHARRON T. SMALLS (Seal)
s/ Sharron T. Smalls (Seal)

THIS LEASE HAVING BEEN EXAMINED BY THE UNDERSIGNED AS PRINCIPAL IS APPROVED WITH ALL THE AGREEMENTS CONTAINED HEREIN.

TRANEL, INC.
By: s/ illegible

APPENDIX G — COPY OF THE GRAND JURY SUBPOENA THAT WAS USED AS A SEARCH WARRANT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

TO:

Custodian of Records-Tranel, Inc.
c/o Binswanger Management Corp.
7 Penn Center
1635 Market Street
Philadelphia, PA 19103

SUBPOENA TO TESTIFY
BEFORE GRAND JURY

SUBPOENA FOR:
DOCUMENTS OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

Place

United States District Court
601 Market Street
Philadelphia, PA 19106

Room

Witness Rm. 4722

Date and Time

3/21/91 - 9:30 A.M.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

Appendix G

Any and all documents, files and computerized records of Amin A. Rashid and Associates, 225 South 15th Street, 30th Floor, Philadelphia, PA 19102.

(Please contact Postal Inspector, Carol Hazelton at (215) 895-8522, if you have any questions.)

This subpoena shall remain in effect until you are granted leave to depart by the court by an officer acting on behalf of the court.

Clerk:

s/ Michael E. Konz
MICHAEL E. KONZ

Date:

2/27/91

This subpoena is issued upon application
of the United States of America
12

Name, Address and Phone Number
of Assistant U.S. Attorney:

THOMAS H. SUDDATH, JR., AUSA
3310 U.S. Courthouse,
601 Market Street
Phila., PA 19106
(215) 597-0400

APPENDIX H — AMENDMENTS IV AND V TO THE UNITED STATES CONSTITUTION

A:/Amendment

AMENDMENT 4

Unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

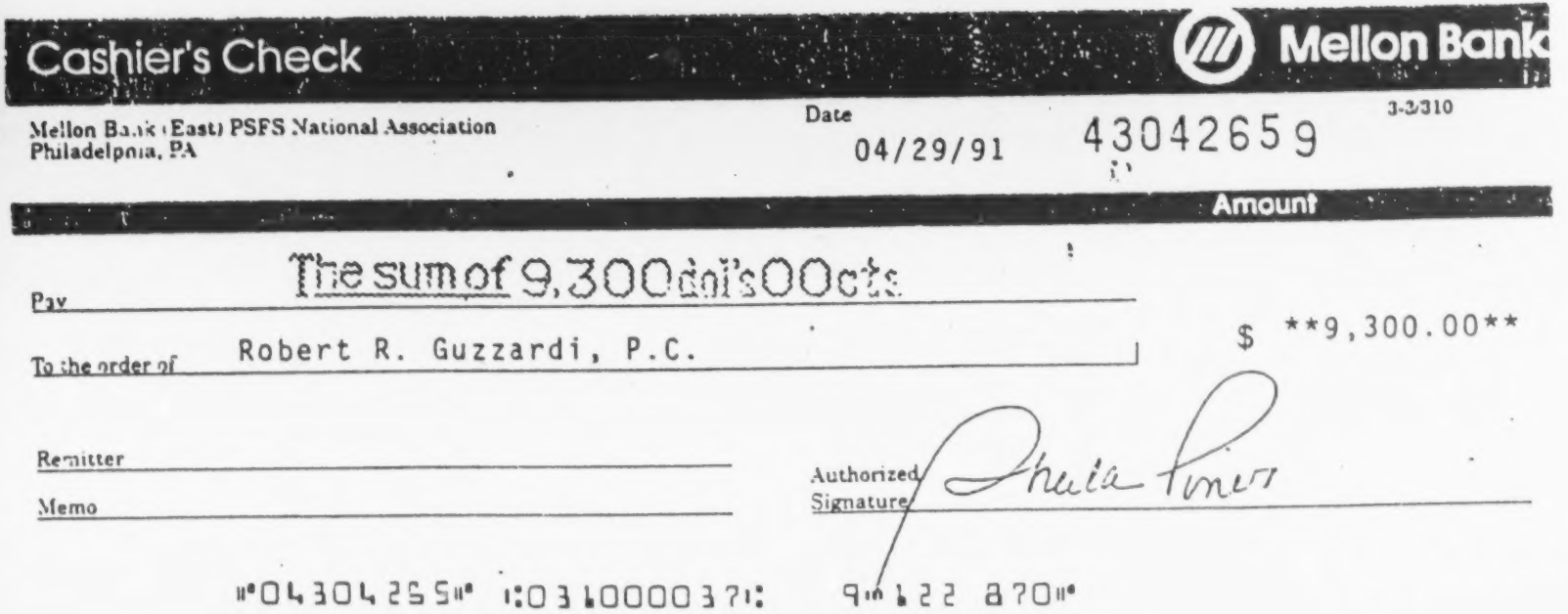
AMENDMENT 5

Criminal actions - Provision concerning - Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

BEST AVAILABLE COPY

APPENDIX I — PHOTOS OF PETITIONER'S RENT DEPOSIT CHECKS FOR THE PREMISES SEARCHED, REPRESENTING EXHIBIT "D-2" TO DISTRICT COURT HEARING ON AUGUST 7, 1991



Cashier's Check

Mellon Bank

Mellon Bank (East) PSFS National Association
Philadelphia, PA

Date 04/29/91

43042659

3-2/310

Amount

Pay The sum of 9,300dol's00cts

To the order of Robert R. Guzzardi, P.C.

$ **9,300.00**

Remitter

Memo

Authorized Signature Sheila Finer

⑈043042659⑈ ⑆031000037⑆ 9⑈122 870⑈

Cashier's Check

Mellon Bank

Mellon Bank (East) PSFS National Association
Philadelphia, PA

Date 04/29/91

43042626

3-3/310

Amount

Pay The sum of 28,817dol's00cts

$ *28,817.00*

To the order of Robert R. Guzzardi, PC

Remitter

Memo

Authorized Signature

⑈043042626⑈ ⑆031000037⑆ 9⑈122 870⑈

BEST AVA

APPENDIX J — DISTRAINT STATUTE 68 P.S. § 250.302

Ch. 8 LANDLORD AND TENANT 68 § 250.302

§ 250.302 Power to distrain for rent; notice

Personal property located upon premises occupied by a tenant shall, unless exempted by article four of this act,[1] be subject to distress for any rent reserved and due. Such distress may be made by the landlord or by his agent duly authorized thereto in writing. Such distress may be made on any day, except Sunday, between the hours of seven ante meridian and seven post meridian and not any other time, except where the tenant through his act prevents the execution of the warrant during such hours.

Notice in writing of such distress, stating the cause of such taking, specifying the date of levy and the personal property distrained sufficiently to inform the tenant or owner what personal property is distrained and the amount of rent in arrears, shall be given, within five days after making the distress to the tenant and any other owner known to the landlord, personally, or by mailing the same to the tenant or any other owner at the premises, or by posting the same conspicuously on the premises charged with the rent.

A landlord or such agent may also, in the manner above provided, distrain personal property located on the premises but only that belonging to the tenant, for arrears of rent due on any lease which has ended and terminated, if such distress is made during the continuance of the landlord's title or interest in the property. 1951, April 6, P.L. 69, art. III, § 302.

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1. Section 250,401 et seq. of this title.

ILABLE COPY

(2)

No. 92-308

FILED
OCT 28 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOHN DOE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals properly dismissed for lack of jurisdiction petitioner's appeal from the denial of a motion under Fed. R. Crim. P. 41(e) for the return of business records obtained from a third party through a grand jury subpoena.

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Miscellaneous:

3 W. LaFave & J. Israel, *Criminal Procedure* (West 1984) 6, 10

In the Supreme Court of the United States

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JOHN DOE, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 3a-4a) is unpublished, but the decision is noted at 961 F.2d 209 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1992. A petition for rehearing was denied on May 18, 1992. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on August 12, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On February 27, 1991, a grand jury sitting in the United States District Court for the Eastern District of Pennsylvania issued a subpoena *duces tecum* to Tranel, Inc., for the production of any and all documents, files and computerized records of Amin A. Rashid & Associates located on the 30th floor of an office building in Philadelphia, Pennsylvania. After the documents were produced, petitioner filed a motion for return of the documents and records pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure. The district court denied the motion, and petitioner appealed. Pet. App. 5a. The court of appeals dismissed the appeal for lack of jurisdiction. *Id.* at 3a-4a.

1. Petitioner is the target of a grand jury investigation into mail fraud, wire fraud and money laundering offenses arising out of a suspected scheme in which petitioner, operating as Amin A. Rashid & Associates, P.C., induced persons seeking sizeable commercial loans to provide him with advance fees based upon false representations as to the availability of the loans. Gov't C.A. Br. 3.

On August 1, 1989, petitioner signed a five-year lease on behalf of Amin A. Rashid & Associates, P.C., with Binswanger Management Corp. for the entire suite of offices and furniture located on the 30th floor of the Lewis Tower Building in Philadelphia. Pet. App. 82a. Between June 1990 and April 1991, the office building was owned by Tranel, Inc., which designated Binswanger as its agent for the management of the building, the collection of rent, and similar matters. In the event of nonpayment of rent, the lease

provided that petitioner could be evicted and Binswanger could enter the leased premises "by force or otherwise." Pet. App. 91a. The lease further provided that all property located in the leased premises following eviction was subject to distraint to satisfy amounts owed under the lease. Gov't C.A. Br. 3-4; Pet. App. 91a-93a; C.A. App. 86a-87a.

By November 1990, petitioner had been delinquent on his rent payments for the past year. After a rent check was dishonored on December 14, 1990, Binswanger notified petitioner's counsel that petitioner would be locked out of the offices on the following Monday, December 17. At that time, petitioner owed approximately $20,000 in rent. On December 17, petitioner was evicted from the leased premises by the Philadelphia sheriff pursuant to a writ of possession obtained by Binswanger. The day after his eviction, petitioner leased office space in another building in Philadelphia. Gov't C.A. Br. 4-5; Pet. App. 36a-40a, 45a-48a, 51a-52a, 65a; C.A. App. 87a-89a.

The government learned of the existence of petitioner's records at his former offices in the Lewis Tower Building on January 25, 1991. One month later, on February 28, 1991, Postal Inspector Carol Hazelton served a grand jury subpoena on Jeffrey Seligsohn, the leasing and management agent for Binswanger. Pet. App. 21a. The subpoena called for the production of "[a]ny and all documents, files and computerized records of Amin A. Rashid and Associates" located in petitioner's former offices on the 30th floor in the Lewis Tower Building. *Id.* at 120a-121a. Seligsohn made arrangements with the building manager, Chris D'Erasmo, to give the government

agents access to the offices. Gov't C.A. Br. 5-7; Pet. App. 21a-26a, 32a-33a; C.A. App. 87a-88a.

On March 4, 1991, D'Erasmo opened petitioner's former offices in the Lewis Tower Building for Postal Inspector Hazelton and an FBI agent, who inspected the records and documents left there. D'Erasmo also gave the agents permission to drill open three locked file cabinets containing documents. The agents returned the next day and removed approximately 30 boxes of records and documents relating to Amin A. Rashid & Associates from petitioner's former offices. Gov't C.A. Br. 6-8; Pet. App. 26a-32a, 53a-56a.

2. On May 24, 1991, nearly three months after Binswanger fully complied with the grand jury subpoena, petitioner filed in the United States District Court for the Eastern District of Pennsylvania a "Motion for Return of Seized Property Pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure." That motion demanded the immediate return of the records and documents produced by Binswanger in response to the grand jury subpoena.[1]

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[1] As amended effective December 1, 1989, Rule 41(e) provides:

> **(e) Motion for Return of Property.** A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings. If a motion

Petitioner asserted that the records and documents were unlawfully seized because the government agents did not have a search warrant. After the government responded to the motion, petitioner filed a "Supplemental Motion for Return of Seized Property Pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure." Among other things, that supplemental motion referred to a grand jury subpoena for handwriting exemplars and fingerprints served on petitioner (with which petitioner had complied voluntarily) and to subpoenas served on other witnesses. See Supplemental Motion at ¶¶ 13, 25. Following an evidentiary hearing, the district court summarily denied the motions. Pet. App. 5a.

3. The court of appeals dismissed petitioner's appeal from the order denying his motions. Pet. App. 3a-4a. Citing *United States* v. *Furina*, 707 F.2d 82 (3d Cir. 1983), the court dismissed the appeal "for lack of appellate jurisdiction." Pet. App. 3a.

ARGUMENT

Petitioner contends that the court of appeals erroneously dismissed his appeal for lack of jurisdiction. Pet. 8-12. In *DiBella* v. *United States*, 369 U.S. 121, 131-132 (1962), this Court held that a district court's ruling on a pre-indictment motion to suppress evidence under Rule 41(e) is a nonappealable interlocutory order unless "the motion is solely for [the] return of property *and* is in no way tied to a criminal

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for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

prosecution *in esse* against the movant" (emphasis supplied). Accord *United States* v. *Furina*, 707 F.2d at 84; see generally 3 W. LaFave & J. Israel, *Criminal Procedure* § 26.2(d), at 198-202 (West 1984). Because petitioner's motion failed to satisfy each of those two requirements for appealability, the court of appeals properly dismissed his appeal. That conclusion does not warrant further review.

1. Petitioner does not dispute (Pet. 8-12) that the pendency of a grand jury investigation into his activities is a criminal prosecution "in being" for purposes of the rule announced by this Court in *DiBella*. See *DiBella* v. *United States*, 369 U.S. at 131 ("[p]resentations * * * before a grand jury * * * are parts of the federal prosecutorial system leading to a criminal trial. Orders granting or denying suppression in the wake of such proceedings are truly interlocutory, for the criminal trial is then fairly in train"). See also *United States* v. *Ryan*, 402 U.S. 530, 533 (1971).[2] Instead, petitioner principally contends

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[2] As the Third Circuit held in *United States* v. *Furina*, 707 F.2d at 84, the majority of the other courts of appeals hold that a pending grand jury investigation is "a criminal prosecution *in esse*" within the meaning of *DiBella* that renders a ruling on a Rule 41(e) motion nonappealable. See *United States* v. *Regional Consulting Services*, 766 F.2d 870, 872-873 (4th Cir. 1985); *DeMassa* v. *Nunez*, 747 F.2d 1283, 1286-1287 (1984), on reh'g, 770 F.2d 1505 (9th Cir. 1985); *Standard Drywall, Inc.* v. *United States*, 668 F.2d 156, 158-159 (2d Cir.), cert. denied, 456 U.S. 927 (1982); *Imperial Distributors, Inc.* v. *United States*, 617 F.2d 892, 896 (1st Cir.), cert. denied, 449 U.S. 891 (1980); *United States* v. *Glassman*, 533 F.2d 262, 263 (5th Cir. 1976). Several courts of appeals, however, hold that a Rule 41(e) motion is not tied to "a criminal prosecution *in esse*" until a

that the district court's order denying his Rule 41(e) motion is appealable because there is no "*record evidence*" that his motion was " 'tied' to a criminal investigation." Pet. 10. That contention is mistaken. In its response to petitioner's motion in the district court, the government specifically noted that petitioner was "the target of a grand jury investigation involving mail fraud, wire fraud, and money laundering." Gov't Mem. in Opp. to Motion for Return of Seized Property at 1 & 2. At the evidentiary hearing on the motion, the government similarly advised the district court that "the Government's case [against petitioner] involves allegations of mail fraud and the Government believes that these files contained further evidence of mail fraud." Pet. App. 67a. The government also noted that it was "in the process of reviewing the documents to present them as part of the Grand Jury investigation" and "should it be determined that these documents may be returned to [petitioner], we will do so at the earliest occasion." *Id.*

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defendant is formally charged or indicted by the grand jury. See, *e.g.*, *In re Warrant Dated December 14, 1990*, 961 F.2d 1241, 1243 (6th Cir. 1992); *In re Search of Premises Known as 6455 South Yosemite*, 897 F.2d 1549, 1554-1555 (10th Cir. 1990); *In re Search of 949 Erie Street*, 824 F.2d 538, 540-541 (7th Cir. 1987); *In re Grand Jury Proceedings*, 716 F.2d 493, 496 (8th Cir. 1983). As we explain below, that disagreement among the courts of appeals does not warrant review in this case because petitioner sought not only return of the property produced pursuant to the grand jury subpoena but also its suppression in any subsequent criminal prosecution. Under *DiBella* v. *United States*, *supra*, that prayer for suppression constituted an independent and fully adequate reason for dismissing petitioner's appeal.

at 77a; see also Gov't C.A. Answer to Petition for Rehearing 2 n.1. Indeed, petitioner's own motion papers in the district court acknowledged his voluntary compliance with another subpoena issued by the same grand jury. Accordingly, because petitioner is the target of a pending grand jury investigation, the order denying his Rule 41(e) motion is not an appealable order under *DiBella*.

Contrary to petitioner's claim (Pet. 9), the decision of the court of appeals in this case does not conflict with its earlier decision in *Government of the Virgin Islands* v. *Edwards*, 903 F.2d 267 (3d Cir. 1990). *Edwards* does not support the proposition that there was no prosecution "in being" against petitioner. In *Edwards*, the defendant moved for the return of certain items of jewelry that he was wearing when he was arrested after he was convicted of burglary. At trial, the victims of the burglary did not identify any of the jewelry as property stolen from their apartments. The government opposed the motion on the ground that the jewelry might be from another robbery, and it stated that it would ask the police to put an advertisement in the newspaper describing the jewelry and seeking to identify its claimant. *Id.* at 272. There was no indication that a grand jury was conducting an investigation into any crime relating to the jewelry. In those circumstances, the court of appeals concluded that the district court's order denying the motion was appealable because "[t]he mere possibility of a prosecution does not deprive an order of finality." *Ibid.* In any event, even if the Third Circuit's decision in this case conflicted with its decision in *Edwards*, such an intracircuit conflict

would not warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

2. Even if petitioner were correct in his contention that there was no criminal investigation pending against him, further review would be unwarranted because his motion sought not only the return of the records but also their suppression in any subsequent criminal prosecution. Petitioner conceded that he sought suppression of the property during oral argument before the court of appeals, and appears to renew that concession before this Court. See Gov't Answer to Petition for Rehearing 5; Pet. 28 n.16. Indeed, the fact that the government has made the documents available for copying by petitioner (Pet. 6) persuasively demonstrates that his principal motivation in continuing to litigate is to obtain a pre-trial appellate determination that those documents may not be used to prosecute him. The court of appeals therefore properly could dismiss petitioner's appeal on the alternative, and fully sufficient ground, that his motion was not "solely for the return of property." See, *e.g.*, *In re Warrant Dated December 14, 1990*, 961 F.2d at 1244-1245.

3. Petitioner contends (Pet. 9-12) that the order denying his Rule 41(e) motion is appealable because he was an intervenor in the district court proceedings who was not served with the grand jury subpoena through which his records were obtained. That contention rests, however, on a fundamental misunderstanding of the difference between a motion for return of property under Rule 41(e) and an intervenor's motion to quash a grand jury subpoena directed to a third party who has possession of the intervenor's

records. In *Cobbledick* v. *United States*, 309 U.S. 323 (1940), this Court held that one to whom a grand jury subpoena is directed may not appeal the denial of a motion to quash the subpoena, but rather he must refuse to obey the subpoena and be held in contempt in order to contest its validity. The Court has also concluded, however, that an intervenor may appeal the denial of a motion to quash a subpoena directed to a third party because the third party may not share the interest of the intervenor in challenging the subpoena. Since the third party may simply obey the subpoena to avoid being held in contempt, the denial of immediate review in that context would deprive the intervenor of any review whatsoever of his challenge to the subpoena. See *United States* v. *Nixon*, 418 U.S. 683, 691 (1974); *United States* v. *Ryan*, 402 U.S at 532-534; *Perlman* v. *United States*, 247 U.S. 7, 12-13 (1918); see generally 3 W. LaFave & J. Israel, *Criminal Procedure* § 26.2(f), at 205-208 (West 1984).[3]

Petitioner's appeal did not lie from an order denying a motion to quash the grand jury subpoena to

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[3] Petitioner misplaces his reliance (Pet. 11) on *United States* v. *Nixon*, *supra*. Contrary to petitioner's claim, that case did not involve an intervenor's motion to quash a grand jury subpoena directed to another party. Rather, that case involved a subpoena issued to the President, who was named as an unindicted co-conspirator in a criminal prosecution against his aides and advisers, to produce certain tape recordings and documents. 418 U.S. at 686-688. This Court held that the district court's denial of the President's motion to quash the subpoena was appealable because "the traditional contempt avenue to immediate appeal [under *Cobbledick* was] peculiarly inappropriate due to the unique setting" in which the case arose. *Id.* at 691.

Binswanger. Instead, he appealed solely from the order denying his motion for return of property pursuant to Rule 41(e).[4] Because petitioner is the target of a grand jury investigation and because his Rule 41(e) motion sought the suppression as well as the return of the records and documents obtained through the grand jury subpoena, this case does not fall within "the limited class of cases where denial of immediate review would render impossible any review whatsoever" of petitioner's claims. *United States* v. *Ryan*, 402 U.S at 533. If the grand jury returns an indictment, petitioner will have the opportunity for appellate review of his claims by raising them as part of that criminal prosecution. On the other hand, if the grand jury does not return an indictment, petitioner's property will be returned to him or he may initiate a new proceeding for return of the property. See, *e.g.*, *Standard Drywall, Inc.* v. *United States*, 668 F.2d at 158. Accordingly, the court of appeals' dismissal of petitioner's appeal in this case does not warrant further review.[5]

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[4] In addition to his Rule 41(e) motion, it appears that petitioner also filed a separate Application to Quash the Subpoena and Direct Return of his Documents in the district court. Although it is unclear from the record whether the district court ever ruled on that motion, it is undisputed here that petitioner appealed solely from the district court's denial of the Rule 41(e) motion. See Pet. 6; Pet. App. 5a.

[5] Petitioner also raises a host of other claims (Pet. 13-28) challenging the merits of the district court's denial of his Rule 41(e) motion. Since the court of appeals ruled that the order denying petitioner's motion was not appealable, it had no occasion to consider those claims. Consequently, those claims are not properly presented for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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